(29,018)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 468.

JAMES C. DAVIS, DESIGNATED AGENT UNDER THE TRANSPORTATION ACT, PETITIONER,

vs.

LEE A. WOLFE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1922.

1 UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered That heretofore, and on the 19th day of March, 1921, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause between Lee A. Wolfe, Respondent, and John Barton Payne, Director General of Railroads, the designated Agent provided for in Section 206 of the Transportation Act of 1920, Appellant, No. 22,771, a certified copy of the judgment of the Circuit Court of the City of St. Louis, and of the order of said circuit court granting an appeal from said judgment to the said Supreme Court, which said certified copy of said judgment and of said order granting an appeal therefrom is in the words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit: at the October Term, nineteen Hundred and Twenty, of the Circuit Court, City of St. Louis, within and for the city and State aforesaid, and on the seventeenth day of November, 1920, it being the Thirty-second day of the October Term, 1920, of said Court, the following proceedings were had in cause No. 32449, Series "B" of the causes in said Court, wherein Lee A. Wolfe is plaintiff and John Barton Payne, Director General of Railroads, the designated Agent provided for in Section 206 of the "Transportation Act," are defendants, to-wit:

2 Wednesday, November 17th, 1920.

32449—B.

LEE A. WOLFE

vs.

JOHN BARTON PAYNE, Director General of Railroads, the Designated Agent Provided for in Section 206 of the "Transportation Act."

Now at this day come again the parties hereto by their respective attorneys, comes also again the jury heretofore sworn and impaneled herein. Thereupon the further trial of this cause is again resumed and progressed, and being finished, the jurors aforesaid upon their oaths as aforesaid say: "We, the jury in the above cause, find in favor of the plaintiff, on the issues herein joined, and assess plaintiff's damages at the sum of fifteen thousand ($15,000.00) dollars. Erwin A. Salomo, Foreman. George W. Shy, Oliver H. Fleming, Wm. L. Stevens, George F. Ruez, Philip H. Jacobi, Harry D. Kusel, Matthew G. Cooney, Otto J. Trautwein."

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant the sum of Fifteen Thousand Dollars ($15,000.00), together with the costs of suit. Verdict and instructions filed.

And afterwards, to-wit: at the February Term, 1921, of said Court, the following further proceedings were had in said cause, to-wit:

3 Friday, February 11th, 1921.

32449—B.

LEE A. WOLFE

vs.

JOHN BARTON PAYNE, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act.

Now at this day comes the defendant by attorneys and upon his motion and for good cause shown the Court doth grant the defendant ninety days' additional time within which to file his bill of exceptions herein; thereupon defendant files and presents to the Court an affidavit for appeal and prays an appeal in the above entitled cause, and the Court having seen and examined said affidavit, doth order that an appeal be and is hereby allowed the defendant to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the city and State aforesaid, do hereby certify that the above and foregoing contains a full, true and complete transcript of the record entry of the judgment in the above entitled cause; showing the term, day of the term and month and year upon which the same shall have been rendered, together with the order granting the appeal in the above cause, as fully as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of St. Louis, this 12th day of March, 1921.

[SEAL.]

NAT GOLDSTEIN,
Clerk Circuit Court.

4 And thereafter, on the 8th day of December, 1921, the said appellant filed his abstract of the record in said cause, which said abstract is in the words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1921 (January Call, 1922).

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant.

Appeal from the Circuit Court of the City of St. Louis, Mo.

Honorable Benjamin J. Klene, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

This is a suit for damages growing out of personal injuries, commenced in the Circuit Court of the City of St. Louis, Missouri, on the 15th day of March, 1920.

Thereafter, on the 24th day of September, 1920, plaintiff amended his petition by interlineation, so that the amended petition upon which the case was tried is in words and figures as follows, to wit (caption omitted):

Amended Petition.

Comes now the plaintiff and for a cause of action against the defendant Walker D. Hines the designated agent under Section 206 of the Transportation Act, states that the within action at law is based on a cause of action arising out of the possession, use and operation by the president of the railroad or system of transportation of the Chicago & Eastern Illinois Railroad Company, a carrier (under the provisions of the Federal Control Act or of the Act of August 29th, 1916), and was of such character as prior to Federal control could have been brought against such carrier, and plaintiff further avers that Federal control has terminated, and that the president did duly appoint Walker D. Hines as the agent against whom such suits might be brought and upon his resignation appointed John Barton Payne, Director General of Railroads, as such agent.

Plaintiff further states that the within cause of action is brought within the period of limitation now prescribed by the State and Federal Statutes, and is brought not later than two years from the passage of such aforementioned Transportation Act in the within court, which, but for Federal control, would have had jurisdiction of the cause of action had it arisen against such carrier.

Plaintiff further states that the railroad or system of transportation of the Chicago & Eastern Illinois Railroad Company at all the times hereinafter mentioned and until March 1st,

1920, was being operated by the United States Railroad Administration through the Director General of Railroads under and by virtue of the laws of the United States and proclamations of the President of the United States, and Walker D. Hines was, until March 1st, 1920, the duly appointed, qualified and acting Director General of Railroads, and, as such, was in charge of and operating the Chicago & Eastern Illinois Railroad, the said Walker D. Hines being the successor in the office of the Director General of Railroads to William G. McAdoo, who was the Director General of Railroads under the United States Railroad Administration operating the aforementioned railroad properties at the time of the grievances herein complained of, and plaintiff further avers that the Director General of Railroads in the operation of the aforementioned railroad properties was at all the times hereinafter mentioned a common carrier by railroad and was engaged in commerce between various states of the United States and various other states of the United States, and plaintiff further avers that while the aforesaid Director General of Railroads in the operation of the aforementioned railroad properties was engaging in such commerce the plaintiff Lee A. Wolfe suffered the injuries herein complained of while he was employed by such carrier in such commerce, such injury resulting in whole and in part from the negligence of the officers, agents and employes of such carrier, and by reason of defects and insufficiencies due to such carrier's negligence in his cars, engines, appliances,

7 track, roadbed, works and other equipment, and plaintiff further avers that on or about the 14th day of March, 1918, the Director General of Railroads under the United States Railroad Administration in the operation of the above-mentioned railroad properties, then and there operated a certain train, which train then and there contained cars which were then and there loaded with goods, wares and merchandise which were then and there being moved from various states of the United States to various other states of the United States in interstate commerce through the Town of Bourbon, in the County of Douglass, in the State of Illinois, and the plaintiff was then and there in the employ of the Director General of Railroads in the operation of the aforementioned railroad properties, and was then and there employed by the Director General of Railroads as a conductor upon the aforementioned train, and plaintiff was then and there in the performance of his duties and was then and there riding on the side of one of the aforementioned cars in the aforementioned train, and by reason of the carelessness and negligence of the defendant, his officers, agents and employes, and by reason of defects and insufficiencies as aforesaid, and in the particulars hereinafter mentioned, plaintiff was caused to fall from the side of the said car underneath same in such a manner that the wheel or wheels of one of the cars in the said train ran over the plaintiff's left arm and crushed and mashed same in such a manner and to such extent that it was necessary to amputate plaintiff's left arm at the shoulder joint, and otherwise injured him as hereinafter stated.

8 First. Plaintiff avers that at the aforementioned time, when he was caused to fall from the said car, he was holding to a grab iron on the side of the said car in the aforesaid train, which train was then and there in motion, and the aforesaid grab iron and car were defective and insufficient, in that the said grab iron was not securely and safely attached to the side of the said car, the grab iron, the bolt or other apparatus used to attach the grab iron to the car and the car at the point of attachment were then and there old, worn, loose, unstable, wabbly and rickety and dangerous and unsafe to work about, and plaintiff further avers that the car and appliances aforementioned had been in the aforementioned condition for some time prior to the time of plaintiff's injuries, and the said carrier and his agents knew, or by the exercise of ordinary care could have known, of such condition and the danger of it in time by the exercise of ordinary care to have prevented plaintiff's injuries by discovering and remedying such condition or taking the car out of service prior to the time the plaintiff received his injuries, or in time to have warned the plaintiff of such defective condition, but plaintiff avers that the said carrier and his agents neglected their duties in these respects and failed and neglected to use ordinary care to discover and to remedy the condition of the said car or to take it out of service or to warn the plaintiff with reference to same, and plaintiff further avers that by reason of the negligence of the said carrier and his agents aforementioned, and by reason of the defects
9 and insufficiencies which were due to the said carrier's negligence, the said car was left in the said train in its aforesaid condition without any warning to the plaintiff, and while he was using same in the performance of his duties without any knowledge of the condition of same, the said grab iron, by reason of the aforementioned defects and insufficiencies then and there gave way, and moved at the point of its fastening to the car, causing the plaintiff to be then and there precipitated and thrown to the ground and injured as herein stated.

Second. Plaintiff further avers that in the performance of his duties as a conductor at the aforementioned time he was riding on the side of the said car in the aforesaid train and was then and there holding to a grab iron on the side of the aforesaid car in the aforementioned train, which train was moving at a slow rate of speed, and the plaintiff Lee A. Wolfe gave a stop signal in the performance of his duties as the conductor upon the said train to those operating and in charge of the movement of the said engine, and plaintiff avers that it was the duty of those in charge of and operating the said engine and train to exercise ordinary care to discover, transmit, pass and act upon the signal given by the plaintiff to bring the train to a stop in accordance with the notorious and well-known and established rules, usages and custom universally in force in the operation of trains there upon that railroad and elsewhere at that time and for a long time prior thereto, and plaintiff further avers that the said agents and employes of the aforesaid carrier negligently
10 failed to look out for and discover the aforesaid stop signal,

or if they did look out for and discover the said stop signal, they neglected to act upon the said stop signal and bring the train to a stop, and carelessly and negligently, without warning the plaintiff of their intention so to do, when they knew, or by the exercise of ordinary care might have known, that he was in a place of danger of being thrown off by such action, suddenly increased the speed of the said train and started the train forward, which occurrence was unusual, unexpected and unnecessary in the movement being made and under the then and there existing circumstance, without any signal from the plaintiff or other person authorized to give such signal to increase the speed and start forward and proceed, in violation of the aforesaid notorious and well-known and established rules, usages and custom universally in force as aforesaid, and thereby precipitated and threw the plaintiff from the side of the said car and underneath same and caused him to be injured as herein stated.

Third. And plaintiff further avers that at the time he was then and there in the employ of the Director General of Railroads in the operation of the aforementioned railroad properties, and was then and there employed by the Director General of Railroads as a conductor upon the aforementioned train, and plaintiff was then and there in the performance of his duties as a conductor, and was then and there riding on the side of a car, known or designated as a "box" or "house" car, which car was then and there being used upon
11 a railroad engaged in interstate commerce and was then and there being used in connection with cars, tenders, engines and similar vehicles used in interstate commerce, in the aforesaid train, which train was not composed of four-wheel cars or eight-wheel standard logging cars, nor of cars of locomotives exclusively used for the transportation of logs, and which train was at the time in motion and the plaintiff was then and there holding to a certain side horizontal handhold sometimes designated as a grab iron in the side of the said car, which handhold or grab iron was then and there not secure, and was then and there not securely fastened as required by the Safety Appliance Acts of the United States and the lawful orders and designations made thereunder by the Interstate Commerce Commission in that the said handhold or grab iron, and the bolt or attaching apparatus, by whatever name called, and the car at the point of attachment were old, worn, loose and unstable, and the grab iron was thereby rendered and made loose, wobbly, rickety, insecure, dangerous and unsafe; and plaintiff further avers that by reason of the aforesaid insecure condition of the said handhold or grab iron, which condition then and there existed in violation of the aforesaid Safety Appliance Acts, the said handhold or grab iron, while the train was in motion, was unstable, and then and there wobbled, slipped, moved and came partly loose and away from the side of the car, due to the fact that it was not secure and was not securely fastened, and the plaintiff was thereby then and there precipitated and thrown, and caused to fall to the ground underneath the said car and to be injured as herein stated.

12 Fourth. And plaintiff further avers that at the aforementioned time he was in the performance of his duty as a conductor upon the aforsaid train, and was then and there on the side of one of the cars in the aforesaid train, and was then and there holding to a grab iron on the side of the said car, which train was at the time moving at a slow rate of speed and further avers that those in charge of and operating the said engine and train who were then and there the employes of the aforesaid carrier, then and there carelessly and negligently and without any cause so to do, suddenly and violently caused the train to start forward with a violent, sudden, unusual and unnecessary jerk of the said train, which violent jerk was extraordinary, unusual, unexpected and unnecessary in the movement then and there being made, and under the circumstances as they existed there at the time, and was not one which the plaintiff could have expected under the circumstances and those in charge of and operating the said train knew, or by the exercise of ordinary care could have known, that the plaintiff was in a position of danger upon the said train, and would likely be injured by such an unusual and unnecessary jerk of the said train, and by reason of the carelessness and negligence of the aforesaid employes of such carrier, the plaintiff was precipitated and thrown to the ground and injured as herein stated.

Plaintiff further states that by reason of the aforementioned matters, singly and collectively, he was thrown from the side of the said car and beneath the wheels of one of the cars in the said train,

13 and one of said wheels ran over plaintiff's left arm and crushed the same in such a manner and to such extent that it was necessary to amputate the plaintiff's left arm at the shoulder joint, and plaintiff further avers that by reason of such injuries he has become permanently crippled, maimed and disfigured, and his earning power has been greatly diminished and impaired, and plaintiff further avers that he will not in the future be able to engage in the same kind of work or to do manual labor, and that by reason of such injuries he has and will in the future suffer great bodily pain and mental anguish, and that he has, since the date of his injuries, lost a part of his wages which he otherwise would have earned, and will in the future lose such wages, and plaintiff further avers that at the time he was injured he was earning from one hundred and fifty to two hundred and twenty-five dollars a month.

Wherefore plaintiff states that he has been damaged in the sum of sixty-five thousand (65,000.00) dollars, for which amount, together with his costs herein, he prays judgment.

SIDNEY THORNE ABLE,
CHAS. P. NOELL,
Attorney for Plaintiff.

Thereafter, on October 28, 1920, defendant filed his amended answer to plaintiff's petition as amended, which amended answer is in words and figures as follows, to wit (omitting caption):

14 *Amended Answer.*

Now comes the above-named defendant and, by leave of Court first had and obtained, files this, his amended answer to plaintiff's petition as amended, and denies each and every allegation therein contained.

Further answering, this defendant avers that whatever injuries, if any, plaintiff sustained on the occasion referred to in his petition were directly due to his own negligence and carelessness in failing to exercise ordinary care for his own safety, in this, to wit, that while acting in the capacity of conductor, in charge of and operating the defendant's train, plaintiff attempted to exchange waybills with the station agent at Bourbon, Illinois, while hanging onto and leaning out from the side of one of the cars of said train as the same was in motion and passing said station, at which time plaintiff slipped and fell from said car, which said act of carelessness and negligence on his part directly contributed to cause the injuries complained of in his petition.

Further answering, defendant avers that whatever injuries, if any, plaintiff sustained on the occasion referred to in his petition were caused by the ordinary and usual risks, hazards and dangers incident to his employment, or risks, hazards and dangers incident to his employment which he knew, or by the exercise of ordinary care on his part he might have known, and all of which were assumed by him at the time.

Further answering, defendant avers that plaintiff had full authority and power, and it was his duty, to bring said train to a stop while transacting official business with the station agent at
15 Bourbon, Illinois, which plaintiff failed and neglected to do, but instead, plaintiff attempted to make an exchange of waybills with the said station agent while hanging onto and leaning out from the side of one of the cars of said train while the same was in motion, which risks, hazards and dangers incident to plaintiff's said act were known to and assumed by him.

Wherefore, having fully answered, defendant prays to be hence dismissed with his costs.

JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for said Defendant.

Thereafter, on November 3, 1920, plaintiff filed his reply to defendant's amended answer, which reply (omitting caption and signatures) is as follows, to wit:

Reply.

Now comes the plaintiff and, for reply to the amended answer of defendant filed herein, denies each and every allegation therein contained.

Wherefore, having fully replied, plaintiff prays judgment in accordance with the prayer of his petition.

Trial in Circuit Court.

Thereafter, to wit, on November 15, 1920, and at the October Term, 1920, of the Circuit Court of the City of St. Louis, Missouri, said cause came on for trial in Division No. 6 before the Honorable Benjamin J. Klene, the Judge presiding in said division, and said trial continued until the 17th day of November, 1920, and
16 on said last-named day, and during the regular October Term, 1920, of said court, the jury returned a verdict into court in favor of the plaintiff and against the defendant in the sum of fifteen thousaid dollars ($15,000.00).

Motion for a New Trial.

Thereafter, on the 19th day of November, 1920, at the said October Term, 1920, of said Circuit Court, and within four (4) days after the rendition of said verdict, defendant duly filed in said cause his motion for a new trial.

Motion for a New Trial Overruled.

Thereafter, on the 7th day of February, 1921, and during the regular February Term, 1921, of said Circuit Court, said defendant's motion for a new trial was, by an order duly entered of record, overruled.

Appeal Taken.

Thereafter, to wit, on the 11th day of February, 1921, and during the regular February Term, 1921, of said Circuit Court, and at the same term at which defendant's motion for a new trial was overruled, defendant filed in said cause his affidavit for an appeal, duly made by an agent and attorney in behalf of the defendant, in the ordinary and proper form as is by the statute in such cases made and provided, from said judgment to the Supreme Court of Missouri, and said Circuit Court, on the 11th day of February, 1921, granted the defendant ninety (90) days in which to file his bill of exceptions, and duly allowed the defendant an appeal to the Supreme
17 Court of the State of Missouri, in accordance with the statutes in such cases made and provided.

Order Filing Bill of Exceptions.

Thereafter, to wit, on the 26th day of September, 1921, and within the time allowed by law, and during the regular June Term, 1921, of the said Circuit Court, defendant's bill of exceptions was duly settled, allowed, signed, sealed and ordered filed and made a part of the record in said cause, and said bill of exceptions was on said day duly filed and made a part of the record herein, all of which fully appears by order duly entered of record in said cause on the said 26th day of September, 1921.

Said bill of exceptions filed by the defendant (omitting caption) is as follows, to wit:

Bill of Exceptions.

Be It Remembered, That on Monday, November 15th, 1920, the above entitled cause came on for a hearing before the Honorable Benj. J. Klene, Judge, and a jury, in Division No. 6, of the Circuit Court of the City of St. Louis, State of Missouri, the plaintiff being represented by Sidney Thorne Able, Esq., and the defendant being represented by Jones, Hocker, Sullivan & Angert (Mr. Lon O. Hocker), and William O. Reeder, Esq.

Thereupon, plaintiff, to sustain the issues to be by him sustained, offered and introduced the following evidence:

18 *Plaintiff's Evidence.*

J. D. HAMMER, a witness of lawful age, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Able:

Q. Will you state your name?
A. J. D. Hammer.
Q. Where do you live?
A. Villa Grove, Illinois.
Q. Who do you work for at this time?
A. Chicago & Eastern Illinois Railroad Company.
Q. In what position?
A. Freight conductor.
Q. Is that the same position that Mr. Wolfe had at the time he was injured?
A. Yes, sir.
Q. What does that position of freight conductor pay at this time?
A. Well, at this time an average of about $250.00 a month.
Q. About how much?
A. Two hundred and fifty dollars a month, average.
Q. About $250.00 a month?
A. Yes, sir.
Q. Is that the job without figuring overtime, or does that include the average amount of overtime?
A. The average amount, the overtime included.
Q. Now, where were you the day Mr. Wolfe was injured?
A. Standing in the depot at Bourbon, looking out the window.
Q. Which side of the track is the depot on there at Bourbon?
A. On the west side.
Q. And just state what you saw there, just before the accident and what occurred at the time of the accident?

A. Well, this train had taken water at the water plug,
19 which was one hundred feet or two hundred feet below the depot, and then pulled on up to the station, and as they pulled by the station slowly, Mr. Wolfe was on the side of the car and gave the stop sign, and they were just drifting along, and then suddenly started ahead and threw him around backward, and he fell on his back and it ran over his left arm.

Q. About where was he with reference to the station window where you were standing, when he first started giving the stop sign?

A. Well, he was giving the sign as he passed the station window.

Q. And what was he doing at the time the accident occurred with reference to the stop sign?

A. Well, he was hanging on the side of the car, with his right hand, giving the sign with his left hand.

Q. Well, now, which end of this car was he on?

A. North end.

Q. At which side?

A. The west side.

Q. Now, the north end of that car was which end, the front end of it or the back end of it?

A. The forward end of it; the north end.

Q. Was that the side where there is a ladder or where there is just—the end where there is a ladder or just a handhold?

A. Just a handhold on that end—grabiron.

Q. I will ask you to look at this picture that I will have the stenographer mark as "Plaintiff's Exhibit A," and ask you if that is a car like the car that Mr. Wolfe was on?

(Said paper was marked by the reporter as "Plaintiff's Exhibit A.")

The Witness: Yes, sir; that is the same series, not that same number.

20 Mr. Able:

Q I will ask you if you can show on that picture the handhold or the place where you saw Mr. Wolfe?

A. On this grab iron, and the ladder is on this end.

Q. I will ask you to take this pen and scratch plainly in about the central part of the handhold, showing the handhold that you say Mr. Wolfe fell from—just to indicate the handhold where he was.

A. There was the handhold (indicating).

Q. You have marked with ink through the handhold, and I will put an arrow pointing to it; does that arrow point to the handhold?

A. Yes, sir.

Q. Now, which hand did you say he had hold of the handhold with?

A. With his right hand.

Q. Now, at that time when he fell, where was the station agent?

A. He had just come out of the station door, going outside.

Q. And about how far was he from Mr. Wolfe at that time?

A. Well, I couldn't say the exact number of feet, but I should judge fifteen feet—he was going out that way (indicating).

Q. How close does the track there run to the station door?

A. Well, the southbound main, I should judge, in my best judgment, would be fifteen feet from the—twelve feet from the station door.

Q. From the station door?

A. And, of course, this was on the northbound main; that would be the track over.

Q. That would be about how many feet farther over?

A. The tracks are—I don't know exactly how far it would be.

Q. The tracks are about four and a half feet wide?

A. Yes.

Q. And about seven or eight feet between the tracks?

A. Seven or eight feet between the tracks, something like that.

Q. Now, when you saw Mr. Wolfe fall, what did you do?

A. I ran right out there.

Q. And when you got out—how did you have to go to get out there?

A. I had to *go back* and come through the waiting room, and out.

Q. And about how far had the train moved by the time you got out there?

A. Well, it moved probably a car length or maybe a little more than that.

Q. And what did you observe, then, with reference to Mr. Wolfe, how he was injured?

A. Well, his left arm was badly crushed—cut off.

Q. About how close to the shoulder would that make?

A. Well, the best you could tell it was very close to the shoulder—right at his shoulder.

Q. Now, what did you do with Mr. Wolfe then?

A. I taken him back to the caboose and went to Tuscola with him to the doctor, as there was no doctor in Bourbon.

Q. When you got into Tuscola and to the doctor was there any examination made by any of the men of the handhold on this car?

A. I walked over there and looked at it.

Q. Who else besides you?

A. Well, I heard the other boys there that they——

Mr. Hocker: Wait a minute; pardon me.

Mr. Able:

Q. I just want to know who it was that saw it, of your knowledge; not what they told you.

A. Well, I looked at it myself.

Q. And just describe to us the condition that you found it in.

A. Well, on the north end of it, of the grab iron—that is the end next to the corner—the wood was worn and seemed

as if it had been working there for quite a while that way; probably was working an inch, or maybe more.

Q. What do you mean by working an inch?

A. Well, it would pull out, like that—the bolt where it worked in and out of the wood.

Q. The bolt to it slipped in and out of the wood?

A. Yes, sir.

Q. About an inch?

A. Yes, sir; the wood was worn, as if it had been working that way for some time.

Q. And what effect would that or did that have on the grab iron itself, with reference to an up-and-down movement?

A. Well, I don't know exactly how far it would work up and down.

Q. Just describe to us, not only by showing us, with one hand only, say with the left hand, what a stop signal is.

A. That is a stop signal (describes signal with hand).

Q. Tell us that so the stenographer can get it; what do you do with your left hand?

A. Lower it and raising it.

Q. Lowering and raising the left hand?

A. Yes, sir.

Q. Now, state whether or not a stop signal has precedence over any other signal?

A. A stop signal is superior to all signals.

Q. What do you mean by that, a stop signal is superior to all signals?

A. Well, they should be obeyed before any other signal, ahead sign or back up, or anything, but a stop signal is superior.

Q. Then if some other person should be giving some other kind of signal, and the man giving the stop signal, which signal must be acted upon?

A. That is the signal.

23 Q. And how many years have you been in railroading?

A. Railroading along there fifteen years—fourteen years.

Q. Has that been the practice and custom all that time?

A. Yes, sir.

Q. And was the practice at that time?

A. Yes, sir.

Q. Now, as those cars—you attempted to describe there just how they were drifting. When the cars were coming up and drifting, as you described them, would the slack be pulled out or would the slack of the cars be up against the engine?

A. If the engine was shut off the slack would run up against the engine.

Q. When the engine puts on steam and starts up with a jerk, what effect does that have on the slack between the cars?

A. That is pretty severe, sometimes.

Mr. Hocker: Sir?

The Court: He didn't ask you that.

Mr. Able:

Q. Does that or does it not let the cars extend out and pull out?
A. Yes, sir; they stretch out.

Cross-examination.

By Mr. Hocker:

Q. You are a freight conductor on the Chicago & Eastern Illinois Railroad Company?
A. Yes, sir.
Q. And were a freight conductor while the Federal Railroad Administration was operating the Chicago & Eastern Illinois Railroad?
A. Yes, sir.
Q. Where do you live?
A. Villa Grove, Illinois.
Q. Villa Grove?
A. Yes, sir.
Q. Did you have a freight train in the yards at Bourbon that day?
A. No, sir.
24 Q. What were you doing there; were you on duty?
A. Yes, sir.
Q. What were you doing there?
A. I lived at Bourbon at that time.
Q. You lived at Bourbon at that time?
A. Yes, sir.
Q. But you were not engaged in service that day or at that time of day?
A. Not just at that time.
Q. You had finished or had you not commenced your day's work?
A. I don't remember whether I was going out that afternoon or not.
Q. What time of day did this happen?
A. About somewhere near three o'clock; I couldn't say exactly.
Q. And how long have you been in the railroad business?
A. About fourteen years.
Q. And had been a conductor part of the time?
A. Yes, sir.
Q. How long a conductor?
A. Well, I think I was promoted after about three years—third of July, three years and six months, somewhere like that.
Q. Before this accident you were a conductor for about three years?
A. Oh, no.
Q. You mean after you started?
A. Yes, sir.
Q. You had been a conductor, then, for ten or eleven years?
A. Yes, sir; ten or eleven years.
Q. And you were a brakeman before that, I presume?
A. Yes, sir.

Q. And you were familiar with the handling of cars and trains, handled them practically every day, or every day you were engaged in the service?

A. Yes, sir.

Q. And it had gotten to be more or less a matter of routine with you, the handling of a freight train?

A. Yes, sir.

25 Q. From the habit of doing it all these years?

A. Yes, sir.

Q. And were you engaged in any duty there at the station that day, or what were you doing?

A. Well, I had come down home that morning on the evening train.

Q. Passenger train?

A. Yes, sir; I had come up to catch the passenger train.

Q. What time did you get the passenger train?

A. Well, about 2.45 it was due. This must—I said about three o'clock—but it was before that.

Q. And you were sitting in the office of the station agent, were you?

A. I was standing there in the office.

Q. I suppose there is a waiting room on one side or the other, or both sides of the office, were they?

A. On one side, yes, sir.

Q. And the freight room on the other and baggage room?

A. Yes, sir.

Q. Who was in there with you?

A. The station agent's wife.

Q. The station agent's wife?

A. Yes, sir.

Q. And whereabouts were you standing?

A. I was standing near the front window.

Q. And what kind of a window is this?

A. Well, it projects out in front.

Q. And where was she?

A. She was standing there. I don't just remember. She was standing near the window, though.

Q. Anybody else there?

A. I don't remember anybody now, there could have been.

Q. You don't recall anyone?

A. No, sir; I don't recall anyone.

26 Q. And you were standing there talking to her, I suppose?

A. Yes, sir.

Q. And waiting for your train?

A. Yes, sir.

Q. You knew Mr. Wolfe and had known him for many years?

A. Yes, sir.

Q. You and he were working on the same division of this railroad and knew one another well and pleasantly, I suppose?

A. Yes, sir.

Q. You had seen Mr. Wolfe, of course, lots of times in the course of his work and your work?

A. Yes, sir.

Q. And you saw him the day before, probably, and the day before that?

A. Yes, sir.

Q. And practically every day you would run across him?

A. Yes, sir.

Q. His position there on the car was not an unusual position, was it?

A. No.

Q. One you had taken yourself and seen others take?

A. Yes, sir.

Q. And nothing about that to particularly attract your attention, was there, until the accident happened?

A. Until the accident.

Q. The things that occurred and the relation of time that they occurred before the accident made no particular impression upon your mind, did they?

A. I couldn't say.

Q. There was nothing unusual about any part of this situation here so as to attract your attention to it as being unusual; it was simply one of the normal things you see in your work——

A. Yes, sir.

Q. —day in and day out?

A. Yes, sir.

27 Q. And not until this man fell did you particularly take in the situation that something unusual was happening?

A. Something unusual had happened.

Q. When he fell you realized that he was in danger and something serious was likely to happen to him; is that right?

A. Yes, sir.

Q. And you ran out, I suppose, and, with the others, went to his assistance?

A. Rescue.

Q. And he was taken care of as best you could there; taken up to some other town, where he could get the aid of a doctor?

A. Yes, sir.

Q. And he was taken as soon as possible—taken to the hospital, where his arm was amputated, I believe?

A. Yes, sir.

Q. Now, this train had not pulled up to the station before it was passing by on this occasion, as you saw it?

A. No, sir.

Q. And it stopped down to take water?

A. Yes, sir.

Q. That was one of your watering stations, was it——

A. Yes, sir.

Q. And after it had taken water it pulled on up past the station?

A. Yes, sir.

Q. And you were simply in there talking to the lady and observ-

ing the train passing by, as you had done time and time again during the fourteen years, I suppose?

A. Yes, sir.

Q. And then you saw this man fall, and then you were absorbed and interested in relieving his injury and suffering, I suppose?

A. Yes, sir.

Q. Was the agent in the office with you before the train come up to pass by?

A. Yes, sir.

28 Q. And when it came up and he saw the engine passing by, he went out?

A. Yes, sir.

Q. Do you know for what purpose?

A. No, I don't, unless it was to transact business.

Q. Well, you don't know for what particular business he went out?

A. No, I don't know for what particular business.

Q. You don't know whether he had any particular business with this crew or not, do you?

A. No, sir; I don't.

Q. And did he have anything in his hands?

A. Well, I don't remember as to whether he did or not; he might have had his papers.

Q. Well, if he had, you have no memory of it?

A. I have no memory of it.

Q. How?

A. I don't remember if he did or not, now.

Q. Well, did you ever remember that he had anything?

A. I don't remember—he could have had——

Q. Well, what is your memory, speaking from your memory about it?

A. I don't remember now what he had in his hand.

Q. You don't recall he did have anything?

A. That he had anything?

Q. And you don't recall of anything happening to indicate why he went out?

A. No, sir.

Q. You know he just went out, as you supposed, in the performance of his routine duties?

A. Yes, sir.

Q. And you had no thought of his having any duties with reference to this particular train when he went out, did you?

A. Me? No.

29 Q. No. Now, where was he when you saw this man fall?

A. The agent?

Q. Yes.

A. He had just come out of the door—waiting room door.

Q. And there is a platform there, I suppose, that the door enters out onto?

A. Yes, sir.

Q. Which is how wide?

A. Well, as I said a few minutes ago, it was—my best judgment would be six or eight feet—just a platform.

Q. Six or eight feet wide?

A. Yes, sir.

Q. The usual platform that they have in local stations?

A. Yes, sir; about ten feet.

Q. It is quite a wide place for people to stand?

A. Yes, sir.

Q. And a place for the baggage trucks to be wheeled along?

A. Yes, sir.

Q. And room enough for people to stand back to be a safe distance away from the trains as they pass?

A. Yes, sir.

Q. And you think that was probably ten or twelve feet wide, wouldn't you?

A. Well, it could possibly be.

Q. And then there was some space between that and the southbound rail—the near rail?

A. The southbound track?

Q. Yes.

A. From the platform over to the southbound?

Q. Yes.

A. Yes, very small space.

Q. Room enough for the cars to pass by and for passengers to step off onto the platform?

A. Yes, sir.

Q. Then there was the width of the rails, which is four feet ten and a half inches, or something like that?

A. Something like that.

Q. And then there was an interval between that and the northbound track?

A. Yes, sir.

Q. Of six or eight feet, or thereabouts?

A. Yes, sir.

Q. Was the station agent on the platform when you observed him there as this man passed by on the car?

A. He had just gone out the door as the man passed in front of the window on the car.

Q. He had just gone out the door. Then he was still on the platform?

A. My best judgment is he was.

Q. Well, did you see him at that time; did you see him at that time when you looked out?

A. Yes.

Q. Well, where was he then after you saw him?

A. Well, now, my best judgment would be on that, that he was on the platform.

Q. And was he between you and the car and the place where this man was hanging, as he passed by?

A. How is that?

Q. He was nearer to you, of course, than to the train?

A. Yes, sir.

Q. Was he about between the outside of the window out of which you were looking and the man that was hanging on the car?
A. I don't remember.
Q. But at any rate he was in the line of your vision and you could see him?
A. Yes, sir.
Q. Was he doing anything?
A. Well, he was going—I don't remember.
Q. Well, was there any business being transacted between him and Mr. Wolfe, as he hung on that car?
A. I don't remember that.
Q. You don't remember that?
A. No.
Q. Was he handing him some waybills, and was Mr. Wolfe handing him back some waybills?
A. I don't know whether he was or not.
31 Q. Well, if he had been on the platform, as you think he was, he couldn't have been doing that?
A. He couldn't have been doing that.
Q. Then you say you don't know whether he was or not, Mr. Hammer; what is your best recollection on that; that you didn't see or don't remember, or what?
A. I don't just remember.
Q. Is it your memory that he was on the platform?
A. I remember that he was going out the door at the time of the accident, out on the platform.
Q. Could you see this train out of the office?
A. Out of the waiting room.
Q. And was it to your right or to your left as you looked out there?
A. To my left.
Q. Could you see thoroughly from where you were standing, or did you see him coming out of the door?
A. I seen him just outside the door.
Q. And he had been in the office before?
A. Yes, sir.
Q. And you knew that was the way out?
A. Yes, sir.
Q. But you didn't see him actually go out the door?
A. Yes, sir.
Q. But you had seen him in the office and inferred probably that he had gone out the door, but you didn't actually see him go out the door, as I understand it?
A. No, sir.
Q. It is important for me to know what your recollection is about whether this man was on the—that is, the station agent—was on the platform of the station, or whether he had gone over the platform into the space between the rails of the southbound track?
A. Well, my best memory on that is that he was on the platform.
32 Q. He was on the platform?
A. That is my best memory on it.

Q. Of course, the recollection of events at the time of the accident was much clearer than it is now?
A. Yes, sir.
Q. And you find that to be true in your experience, don't you, that the further away you get from an event the dimmer your memory is about it?
A. Yes, sir.
Q. I want you to look at this paper and see if—is that your signature?
A. Yes, sir.
Q. And I want you to turn over here and look at the body of the paper; is that your handwriting?
A. Yes, sir.
Q. You filled that out?
A. I did.
Q. When?
A. That is dated 3/14/18.
Q. Well, the dating is in your handwriting, isn't it?
A. Yes, sir.
Q. And that was what day with reference to this accident, the same day or the following day?
A. Well, I don't remember the date of the accident.

Mr. Hocker: What is the date of the accident, Mr. Able?
Mr. Reeder: March 14th.
The Witness: This is the date of the accident here—and that is the date it is filled out, 3/17.

Mr. Hocker:

Q. That would be three days after the accident that you made this out?
A. Yes, sir.
Q. And this is in your handwriting, as I understand?
A. Yes, sir.
Q. And would it refresh your recollection to hear me read part of what that contains?
A. Probably it would.
33 Q. Well, I will ask if you didn't state this in this document: "Give full particulars and state all facts in full." "I was sitting in the office of the depot looking out window, Mr. Wolfe was hanging on a car about six cars from cab; left arm was run over near shoulder."
A. Yes, sir.
Q. Just that we may be sure about it, will you look at that?
A. Yes, sir; he possibly was changing bills.
Q. That is in your handwriting?
A. Yes, sir; I said I didn't remember.
Q. If you made that statement at that time three or four days after the accident, that probably more accurately represents your knowledge of the situation than what you would say here today, wouldn't it?

A. He could have been exchanging them, but I wouldn't say it was bills, because I didn't examine them.
Q. They were probably exchanging bills?
A. Something.
Q. And in order to exchange these bills, for him to hand up what he had and to receive what Mr. Wolfe had, he would have to be, of course, fairly close to the car track?
A. Yes, sir.
Q. And where he could touch Mr. Wolfe's hand, as the cars passed by him?
A. Yes, sir.
Q. You don't know what Mr. Wolfe had been doing before he got onto this car, do you?
A. No, I don't.
Q. This "B. & L. E.," what does that mean, what does that stand for?
A. Bessemer car.
Q. What is the "L. E." for?
A. Bessemer.
Q. Is it Lake Erie, or what?
A. I couldn't say.

Mr. Able: That is right.

34 Mr. Hocker:

Q. I suppose you railroad men know all of those initials, but they belong to that company, whatever it was, the B. & L. E.?
A. Yes, sir.
Q. You don't know where that car had come from and you don't know what it was loaded with?
A. No, sir; I don't.
Q. Of your own knowledge?
A. I don't know, myself.
Q. I say, you don't know of your own knowledge, what it had in it?
A. No, sir.
Q. And you don't know where it had been received by the railroad that you were working for?
A. No, sir.
Q. Where are the doors—are these side doors on this car—they are side doors, aren't they, like there are on the ordinary box cars?
A. Yes, sir.
Q. And where are the seals that fastened the door?
A. Right there, that hasp.
Q. Right down in the lower corner, toward the ladder of the car, rather than towards the other end?
A. Yes, sir.
Q. The doors slide, do they?
A. Yes, sir.
Q. And those seals, are they stamped?
A. Yes, sir.

Q. With numbers?
A. Yes, sir.
Q. And the conductor's duty is to report the numbers on those seals at times?
A. Yes, sir.
Q. And, of course, you didn't see Mr. Wolfe, as I understand, taking the numbers of any seals?
A. No.
Q. This grab iron was the only grab iron on that end of the car?
A. Yes, sir.
Q. And there was a stirrup, an iron stirrup or step, which you step on in catching hold of the grab iron?
A. Yes, sir.
35 Q. How far above the bottom of this stirrup would you say the grab iron was on this car?
A. Well, I couldn't say the exact number of feet, but it was about in that position, when you have got hold of one of them (indicating).
Q. In rather a crouching position?
A. Yes, sir.
Q. You wouldn't be able to stand up straight and hold on?
A. No, you couldn't.
Q. There is the same kind of a stirrup on the other end of the car and which is above the ladder?
A. Yes, sir.
Q. Did you look and examine the ladder?
A. No, sir; I did not.
Q. You don't know what condition it was in?
A. No, I don't.
Q. Where did you make your examination?
A. At Tuscola.
Q. That was when?
A. That was probably thirty minutes after the accident, after Mr. Wolfe had been taken care of.
Q. Did this train go on to Tuscola?
A. Yes, sir.
Q. And you went on in with it?
A. Yes, sir.
Q. Was he on the train?
A. Yes, sir.
Q. And there you found a doctor?
A. Yes, sir.
Q. And after you had gotten him placed you made that examination?
A. Yes, sir.
Q. This was a good deal like one of these towel racks you see in some bathrooms, a solid piece, bent, wasn't it?
A. Yes, sir.
Q. And the ends projecting into the woodwork of the car?
A. Yes, sir; against the woodwork of the car.
Q. And do the ends go clear through, and wasn't there a nut on the other end which screwed on, on the inside of the car?

36 A. The bolt goes through the car and screws through the hole of the grab iron and the nut on the outside then.

Q. Is the nut on the outside—I am really asking for information—is the nut on the outside?

A. Yes, sir.

Q. And how is this fastened to the nut?

A. I don't get you.

Q. This grab iron, how is it fastened to the nut that you speak of?

A. The bolt goes through the car and then through the grab iron and then the nut put on.

Q. There is a hole in the face of the grab iron that goes against the wall?

A. Yes, sir.

Q. And there was some play in and out, do I understand?

A. Yes, sir.

Q. In other words, the nut may have worked some little—by use would have enlarged the hole, so to speak?

A. Yes, sir; the wood was worn.

Q. But you couldn't pull it out, could you?

A. No, sir; you couldn't pull it out.

Q. It was fastened there securely so far as being able to pull it out?

A. Yes, sir.

Q. And was it worn on one side or both sides?

A. One side.

Q. Which side?

A. The north end.

Q. And I suppose when you got hold of it and gave any pull on it, it would come out just as you say it would, and then it would stay there, wouldn't it; for instance, if you were standing there with your foot in the stirrup or both feet in the stirrup, and with your right foot in the stirrup or both feet in the stirrup, and with your right hand, as I believe he did, holding on to the grab iron, that was sufficient weight to pull it out as far as it would go, wasn't it?

A. Yes, if it was not clamped it would come right out.

37 Q. Half of the man's weight would be on the grab iron if he would be standing there?

A. Yes, sir.

Q. And his weight would be sufficient to pull it out as far as it would go?

A. Yes, sir.

Q. Mr. Hammer, I want to ask you whether in this statement or this form which you filled out, and which you said was in your handwriting—you filled this out by yourself, didn't you?

A. Yes, sir.

Q. Just went into some place where it was convenient and wrote out and filled out this blank form which you had for that purpose, I suppose?

A. Yes, sir.

Q. Do you recall this question, No. 18: "What was injured per-

son doing at time accident occurred," and you filled in in your handwriting, "Exchanging bills with agent?"

A. Yes.

Q. Do you remember that?

A. Yes.

Q. That was in addition?

A. I don't remember now, but since you have brought it fresh to my mind there, he could have been exchanging bills.

Q. That is in your handwriting?

A. Yes, sir; he could have possibly been passing them.

Q. You say "possibly," you still have no memory about it?

A. I haven't any memory about it.

Q. You remember this question No. 21: "What defects were found," and your answer is, "Don't know."

A. Well, I was no car inspector. I know the grab iron was loose.

Q. And this form, I suppose, contains a great number of questions, it is one that is intended to be used in most any kind of an accident, isn't it?

A. Yes, sir.

Q. And covers most any sort of an accident that could happen?

A. Yes, sir.

38 Q. Do you remember this question No. 24: "Who was in charge of the train of cars at time of accident," and your answer, "L. A. Wolfe." "What signals were given." "Stop." "Who gave signals?" "Don't know." Do you remember that statement?

A. No, I don't remember that.

Q. Well, is that your handwriting, that No. 21?

A. That is in my handwriting, but you will notice there is a note there that I say "Don't know," which has to be filled out.

Q. If you had known who had given the stop signal, as you say today, you wouldn't have said "Don't know," would you?

A. No.

Q. Just as easy to write "L. A. Wolfe" as it was "Don't know," wasn't it?

A. Yes, sir.

Q. You just read in that same line, in answer to another part of the question, "L. A. Wolfe," and when you were asked who gave the stop signal, you say "Don't know." If you had known L. A. Wolfe had given the stop signal, you would have written it in, wouldn't you?

A. I know he gave the stop signal.

Q. If you had known it at that time he gave the stop signal, you would have written it in, wouldn't you?

A. I did know it at that time.

Q. Then, why didn't you write it in?

A. I don't remember now.

Q. You don't remember now?

A. As I said before, you notice almost all those questions "Don't know." I could have probably just gone down through and overlooked that one.

Q. That wasn't my question; but if you did know at that time that Mr. Wolfe was giving the stop signal, wouldn't you
39 have written it in, and if you wouldn't why wouldn't you?
A. Why, I do know he was giving it.
Q. Why didn't *say* say so in the statement you were filling out in your handwriting at the time, yourself?
A. I don't remember why I didn't, because I was putting down so many "don't know," I could have possibly made an error.
Q. You got in the "don't know" habit; is that the idea?
A. Maybe I had the "don't know" habit.
Q. Here is No. 25, "Were they obeyed?" that follows immediately after "Who gave the stop signal?" and "Were they obeyed?" "Yes." Is that right, stop signal obeyed?
A. Why, they were slowing up, drifting along.
Q. Despite the fact that this man was giving a stop signal, they started up?
A. They did—the train never came to a full stop until after the accident occurred.
Q. I understand that, but you said that while he was giving a stop signal the train was drifting along and that instead of stopping he started up and jerked the car?
A. Yes, sir; he did; and did not stop until after the accident.
Q. Did he start up?
A. Yes, sir.
Q. Then why didn't you say that when you were asked what signals were given, and in your own handwriting you say "Stop," and "Stop signal;" "Who gave signal?" "Don't know;" "Were they obeyed?" "Yes;" that is all in your handwriting, isn't it?
A. I probably made that out the next day at work.
40 Q. You were getting into the "yes" habit then as well as the "don't know" habit?
A. That is my handwriting there.
Q. That is your handwriting?
A. Yes, sir; every bit of it.
Q. And you said this stop signal was obeyed in your statement, didn't you?
A. I do, in that statement.
Q. This statement, you were writing this out by yourself, with nobody coaching you or talking to you, and you were trying to tell how this thing happened as well as you could, weren't you? You weren't trying to help Wolfe or the railroad company or anybody; you were trying to tell what you knew, weren't you? Isn't that true?
A. I could have paid closer attention to the report than I do to most of them.
Q. And then it says: "Who was in charge of engine?" "Greenwood." Is that right?
A. Yes, sir.
Q. "Was it properly handled?" What is your answer to that question?
A. I don't remember now.

Q. Well, look here and see. "Was it properly handled?" What did you put in there in your own handwriting?

A. "Yes."

Q. Yes. Now, you say it wasn't properly handled; is that right?

A. Yes; I say that they went ahead and the train didn't come to a full stop.

Q. Then it wasn't properly handled, but you have told us about the signals and that the stop signal is the paramount signal, and it wasn't obeyed; is that right?

A. Why, no; they didn't stop.

41 Q. So it wasn't properly obeyed; that is what you are saying today?

A. Yes, sir.

Q. Although three days afterwards you said it was?

A. Yes, sir.

Redirect examination.

By Mr. Able:

Q. What is the number of that B. & L. E. car, do you know?

A. The exact number?

Q. Yes.

A. I can't give you the exact number.

Q. Could you refresh your memory from the statement that you made out, or do you know whether that number appears on the statement that you gave to the company, that Mr. Hocker has just been asking you about?

A. Well, it should give it.

Q. Mr. Hocker asked about a stop signal and the answer, and afterwards about whether or not it was obeyed or not. Just state what stop that had reference to, if it had reference to—whether or not it had reference to the stop after the man was injured on the previous stop signal. Can you tell by looking at this report whether that stop which you say was obeyed was the one that occurred at the time you say the accident happened? I will ask Mr. Hocker to let the witness look at the statement.

Mr. Hocker: Certainly.

The Witness: You understand this was made out after the accident occurred.

Mr. *B*ble:

Q. Yes, but my question is, there seems to be some question——

Mr. Hocker: One minute. I object to the leading form

42 and the suggestive form of the question. He can ask what that relates to, if he wishes, but no use of putting the words in this willing witness' mouth about this.

Mr. Able: I think the question is a little leading and suggestive, but I think Mr. Hocker has taken a little unfair advantage of the witness by picking out places down on the statement and asking

him about some stop signal that was obeyed and confusing the witness by asking whether or not that had reference to the previous stop signal or the stop signal that was undoubtedly given after the accident happened, and I think we are entitled to know that.

Mr. Hocker: I object to that. The witness has received the very artful suggestion that has been given to him by the argument of counsel—pretty well done.

Mr. Able: As long as I am accused of attempting to state something to the witness, I won't ask him another question on that point.

Mr. Able:

Q. Which handhold did you examine? Can you show us on this picture which handhold you examined on this car?

A. Yes, sir; I examined this one right here.

Q. That is on this picture, Plaintiff's Exhibit "A"?

A. Yes, sir.

Q. And which handhold was the plaintiff holding to at the time the accident occurred?

A. This handhold, the one at the corner the one that was working, and the wood was worn.

Q. Each time you have pointed to the handhold where the arrow points on the picture?

A. Yes, sir.

43 Q. Is that correct?

A. Yes, sir; absolutely correct.

Mr. Hocker: I will ask this be marked as "Defendant's Exhibit 1."

(Said paper was marked by the reporter as "Defendant's Exhibit 1.")

DEFENDANT'S EXHIBIT 1.

Report of Accidents Involving Train, Car, or Engine Movement.

Note instructions carefully. Make report with ink. No excuse will be accepted for failure to make this report promptly.

1. Have you read all the instructions (see the back) on this report? Yes.

2. Date of accident—3-14-18. Hour, 3:15 p. m.

3. Name of person injured, L. A. Wolfe. Residence (street and number), Pana, Ills.

4. Occupation? Condr. Age? Don't know. Married or single? Married.

5. If married, name and residence of wife or husband? Pana, Ills. No. of children? Don't know.

6. If single, names and addresses of father, mother or nearest relatives? Married.

7. If employe, how long in service of this company? Don't know. Date last entered this company's service? Don't know.

8. Place of accident, station and distance and direction therefrom — on — Division.

9. Was it clear or stormy, dark or moonlight? Clear.
44 Main or sidetrack? Main. Curve or straight line? Straight line.

10. Train No.? 160. Engine No.? 887. Conductor, yardmaster or foreman? Condr.

11. Engineer? Greenwood. Fireman? H. E. Scott.

12. Baggageman? None. Head brakeman? Clint Bauman.

13. Rear brakeman and porter? J. L. Bauman. 3rd Bkm., C. P. Fisher.

14. Switchman? None.

15. Other employes? None.

16. No. cars in train? Don't know. No. loads —. No. cars with air brakes? Don't know. Up or down grade? Level.

17. Speed of engine or cars at time of accident? 6 per hr. If train late, how much? 1 hr. 55. If backing up, who was on rear end? Going ahead.

18. What was injured person doing at time accident occurred? Exchanging bills with agent.

19. Did he have lantern? No. Was it lighted? Daylight.

20. Give initials and numbers of engines and cars immediately connected with this injury, and condition of same (make detailed inspection report on Form 704). Don't know. If in bad order were they so marked? Don't know.

21. What defects were found? Don't know.

22. When, by whom and to whom had same been reported? Don't know.

23. Did injured person know of defect? Don't know.

24. Who was in charge of the train or cars at time of accident? L. A. Wolfe. What signals were given? Stop. Who gave signals? Don't know.

45 25. Were they obeyed? Yes. Who was in charge of the engine? Greenwood. Was it properly handled? Yes.

26. What distance did engine or cars run after accident occurred? 2 car lengths. Was anyone at fault? If so, who? No.

27. State your location with reference to point of accident, and what you were doing? Sitting in office of depot looking out window.

28. What does injured person say was cause of accident? Don't know. Whom does he blame? Don't know.

29. In whose hearing was statement made? Don't know.

30. State fully the nature and extent of injuries, and prospect of recovery. Left arm run over at shoulder.

31. What does injured person say as to extent of his injuries? Did not say.

32. What was done with and for the person? Taken to Pana, Ills., Hospital.

33. Name and address of surgical attendant? Dr. Rice first, Dr. Blane later, of Tuscola, Ills. Who called him? —— ——.

34. Employe, passenger, traveler on highway or trespasser? Employe.

35. If passenger, where from, and destination? Employe. Ticket or pass? Employe.

36. Was it on a street crossing? No. Were gates down? None. Name of gatetender or flagman? None.

36*a*. Name of street? None.

37. Did accident occur on or near a highway crossing? (State name, and distance and direction from same and nearest 46 mile post.) In front of depot at Bourbon, Ills.

38. Was there bell at crossing? None. Was it ringing? None.

39. How was injured person traveling? Employe. Was his view obscured by carriage top or curtains? Employe.

40. If person's sight or hearing was obscured by wrappings of any kind, describe them fully. No.

41. If a trespasser, what was he doing? Employe. How far was he from train when his danger was discovered? Employe.

42. Was view of trainmen or injured person obstructed? If so, by what? State fully. No.

43. State what precautions were taken, and by whom, to prevent the accident. None.

44. In your opinion, what further precaution could have been taken? None.

45. What signals or warnings were given, and by whom, and in what way? None.

46. Was whistle sounded? No. Was bell rung, and by whom? Don't know. Was bell rung continuously? Don't know.

47. When and where, with reference to the accident, was whistle sounded and bell rung? Don't know.

48. Was headlight burning? No.

49. Were signals or warnings acted upon? If not, why? Yes.

50. What station, street or other lights were near by? None.

51. Was injured person insane, intoxicated, blind or deaf? No.

52. If dead, state disposition of remains. No.

47 53. If unknown, give full description (height, weight, hair, eyes, marks and clothing) and state what articles found on person. Employe.

54. Give full particulars of cause of accident. State all facts in full. (If this space is not enough, attach statement on separate paper.) I was sitting in office of depot looking out window. Mr. Wolfe was hanging on a car about 6 cars from cab. Was exchanging bills with agent. While pulling by fell from car, afterwards was run over near shoulder.

55. Who was with injured person at time of accident? Name and address. Crew.

56. Who first reached injured person? Station Agent Bourbon.

57. Name and address? Mr. S. G. Blackwell, Bourbon, Ills.

Name, occupation, post office address and residence of every person who witnessed the accident, or can give any information regarding it.

Name.	Occupation.	Residence and P. O. (give street number).
.....	.....	.....
.....	.....	.....
.....	.....	.....

Be sure *and* make inspection report. Form MP. 171 (Standard) if car, engine or machinery tools are involved in the accident.

Signature: J. D. HAMMER.

Headquarters: Villa Grove, Ills.
Occupation: Condr.
Date: 3-17-1918.

48 At this point the Court, after instructing the jury as to their actions while absent from the courtroom, adjourned until Tuesday morning, November 16th, 1920, at 10 a. m., at which time the following proceedings were had, to wit:

W. S. ERHARDT, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Able:

Q. Will you state your name, please?
A. W. S. Erhardt.
Q. Where do you live, Mr. Erhardt?
A. Arthur, Illinois.
Q. Who do you work for?
A. Chicago & Eastern Illinois Railroad Company.
Q. In what position?
A. As a clerk.
Q. In their offices where?
A. At Arthur, Illinois.
Q. How long have you been a clerk in that office?
A. Better than four years.
Q. Then you were a clerk in that office on March 14th, 1918, were you?
A. Yes, sir.
Q. I will ask you to look at this book marked "October 20th, 1917, to April 14th, 1918," and tell us what that book is?
A. That is the duplicate of the original waybills, freight forwarded from Arthur, carloads and less than carload lots.
Q. State whether or not that is a record kept there in the due course of business.
A. Yes, sir.
49 Q. Do you know how many years the Interstate Commerce Commission required that that record be kept and not destroyed?
A. Eight years, I am almost positive.
Q. I will ask you to turn to the page that you have marked here and tell us what that page shows.
A. It shows freight from station No. 306, Arthur, Illinois, to Terre Haute, Indiana, March 14th, 1918; wayills, series No. 71, B. & L. E., 80993, consignor Paul Kuhn & Company, and consignee, Paul Kuhn & Company; contents, corn, 100,000 pounds weight; rate, 7 cents per hundred pounds; freight, $70.00; seals, P K. & Co. 52973, 52974.

The Court:

Q. I didn't catch the first part; from what point was the shipment?
A. From station No. 306, Arthur, Illinois.
Q. To?
A. Terre Haute, Indiana.

Mr. Able: I don't know whether it is necessary or not, your Honor, but this record ought to go back to the railroad. I would like leave

of Court to make a photographic copy of this page that has been read and introduce it as Plaintiff's Exhibit —. I suppose there is no objection to that, is there?

Mr. Hocker: No objection to that.

Mr. Able: Mr. Hocker says there is no objection.

The Court: Very well.

(Insert Plaintiff's Exhibit, Photograph of Record, here. Omitted by consent.)

50 C. P. FISHER, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Able:

Q. Will you state your name?
A. C. P. Fisher.
Q. Where do you live, Mr. Fisher?
A. Villa Grove, Illinois.
Q. Who do you work for at this time?
A. Chicago & Eastern Illinois Railroad Company.
Q. How long have you been working for the Chicago & Eastern Illinois Railroad Company?
A. I have been ten years in the train service, and two years as a clerk.
Q. How many years in the train service?
A. Ten years.
Q. And how many years as a clerk?
A. Two.
Q. Where did you serve as clerk?
A. At Arthur, Illinois, and at Villa Grove, Illinois.
Q. Were you in the crew of conductor Wolfe, the day he was injured?
A. Brakeman.
Q. You were brakeman?
A. Yes, sir.
Q. And in his crew?
A. Yes, sir.
Q. Where were you at the time the accident occurred?
A. On the engine.
Q. Where, in the engine?
A. I was sitting on the seat box behind the engineer.
Q. Is that on the side of the train towards the station or opposite from the station?
A. Opposite to the station.
Q. Whose side of the engine was towards the station?
A. Fireman's side.

51 Q. On which side of the train did the accident occur?
A. On the fireman's side.

Q. Now, just state, as you reached Bourbon, Illinois, which direction were you going there?
A. North.
Q. On which track?
A. On the northbound track.
Q. And what did you do first upon reaching Bourbon, Illinois?
A. Well, we stopped—the engine stopped to take water.
Q. That is south of the station, is it?
A. Yes, sir.
Q. Now, after you took water, what did the train do?
A. Well, we stopped to take water and I walked over towards the engine and got almost there, and they started up, and I run and got on the engine, and they started up, drifting along slow, and we were going along there three or four miles an hour, and the engineer gave her more steam to go ahead.
Q. To go where?
A. To go down to the other end, to pick up a car.
Q. And to what track was that?
A. That was north of where we were at the time of the accident.
Q. Were you on the side so that you could see—I believe you stated you were on the opposite side from the station?
A. Yes, sir.
Q. So you were not on the side that the accident occurred on?
A. No, sir.
Q. Was there anything unusual that attracted your attention to the fact that something had occurred?
A. Well, we didn't come to a stop there, and about that time the fireman hollered "Stop," or some such thing.
Q. And what did the engineer do then?
A. He stopped right down just as quick as he could.
52 Q. And after he stopped, did you discover that there had been an accident of some kind?
A. Yes, sir.
Q. And what did you do?
A. Well, I started to run back there towards the rear of the train.
Q. When you went back, what did you find?
A. I found Mr. Wolfe with his arm crushed.

Mr. Hocker:

Q. I didn't understand you?
A. I found Mr. Wolfe with his arm crushed.

Mr. Able:

Q. And what was done?
A. Well, they had him on the caboose before I got there.
Q. They had already taken him back to the caboose?
A. Yes, sir; and we left and started for Tuscola.
Q. And now, when you got to Tuscola, what was done?
A. They called the doctor and they got the doctor over there and

tried to relieve him and stop the blood, the best he could, and then he—well, they waited then until the other train came in to take him to Pana.

Q. Was that where the hospital was, at Pana?

A. Yes, sir.

Q. Now, what, if anything, was done at Tuscola with reference to looking at the car where the accident occurred?

A. Well, we looked at that car that he was on, at Tuscola.

Q. And which end of the car did you look at?

A. Looked at the north end.

Q. Which side?

A. The right-hand side, on the west side of the car.

Q. And how did you happen to look at that end of the car?

53 A. Well, I did not know where he was, and I asked Mr. Wolfe which car he was on.

Mr. Hocker: Just a moment; I object to any conversation with Mr. Wolfe, here.

The Court: That will be sustained.

Mr. Able:

Q. You did go back to look at the car to see what condition it was in?

A. Yes, sir.

Q. And who went with you?

A. The engineer.

Q. What is his name?

A. Greenwood.

Q. Was he in court here yesterday?

A. Yes, sir.

Q. Did anybody else go back to look at the car?

A. I couldn't say for sure whether there was anybody or not.

Q. And when you got back there, what did you find?

A. Found a loose grab iron on the car.

Q. And which grab iron was that?

A. That was the north grab iron.

Q. That end of the car on the north end or west side was there more than one grab iron?

A. Only one.

Q. That was the only one—that is the usual number; they only have one on that end?

A. Yes, sir.

Q. On which car was that that you examined it?

A. B. & L. E. 80993, I think was the number.

Q. You made out a report of some kind right immediately, did you?

A. Yes, sir.

Q. And did you keep a copy of that report?

A. Yes, sir.

Q. Can you refresh your recollection as to whether—is that the way you know that was the number; that is, you have re-

54 freshed your memory from that report?

A. Yes, sir.
Q. And that is a duplicate of the copy you gave in to the company?
A. Yes, sir.
Q. Did you report this loose grab iron to the company?
A. On that report I made out I made the statement on there that we found it on the car.
Q. Do you know whether a car inspector there at Tuscola examined that same grab iron?
A. I think he did.
Q. Do you know the name of this inspector there at Tuscola?
A. I know his last name; I don't know his first name.
Q. What is that?
A. McLannin.
Q. Do you know how to spell that?
A. No, I don't.
Q. Is he still working there as a car inspector?
A. Yes, sir.
Q. Have you seen him down here yesterday or today?
A. No, sir.
Q. Just describe the condition of this grab iron that you examined.
A. Well, I found the hole that is fastened to the grab iron, worn some, and the bolt had slipped through there, I should say an inch or more; an inch and a half, something like that.
Q. You said it moved an inch or more, which direction, up and down, or out?
A. You could pull it out. I tried it and pulled it out, and it slipped in the wood, like a bolt would slip in the wood.
Q. Now, what effect, if any, would that have on the up and down movement of this grab iron?
A. Well, that would have a little more play up and down, than it would straight in and out.
55 Q. Now, where was this Bessemer car in the train?
A. I think, as near as I remember, it was the sixth car from the engine.
Q. After Mr. Wolfe was hurt, who took charge of this train?
A. Well, they gave us a message at Tuscola to do no more work, and go to Villa Grove, and I handled his bills to the——
Q. You possibly misunderstood my question. I mean somebody had to run this train from Bourbon to Tuscola. Who was in charge in the place of conductor Wolfe?
A. Well, there was conductor Hammer. We just took him over there as quick as we could get him over there.
Q. That is the witness who testified yesterday?
A. Yes, sir.
Q. You say this car was about how far from the engine?
A. About the sixth car.
Q. And about how many cars did you have in the train at that time?
A. There were eleven cars.

Cross-examination.

By Mr. Hocker:

Q. You didn't see this accident, as I understand your testimony?
A. No, sir.
Q. You were on the engine, and the fireman and the engineer, I suppose, were also on the engine?
A. Yes, sir.
Q. You had been on the ground walking along the side of this train——
A. Yes, sir.
Q. —just before the accident?
A. Yes, sir.
Q. And Mr. Wolfe was taking the seal numbers——
A. Yes, sir.
56 Q. —off of certain cars?
A. Yes, sir.
Q. But before the train started up from the water tank you had gone ahead towards the engine?
A. Yes, sir.
Q. And about the time they started up you got on?
A. Yes, sir.
Q. And how far would you say the car ran from the time it started up until you heard an exclamation from the fireman, and the train stopped?
A. Well, I should judge we must have gone—I don't know, four or five car lengths, I reckon, from the time I got on the engine until we stopped.
Q. Did you get on before the engine started, or afterwards?
A. As near as I remember, about the time the engine started.
Q. About the same time?
A. Yes, sir.
Q. A car is how long, thirty-five feet?
A. From thirty-six to forty-two feet long.
Q. And four or five car lengths it had gone, then, before anything unusual happened, and the train stopped?
A. Yes, sir.
Q. The train was moving along slowly?
A. Drifting along slowly.
Q. What is the grade there?
A. Well, one side of the water plug is right on kind of a knob, the last part of the knob there is on downhill, a little bit, both ways.
Q. From the water tank?
A. Yes, sir.
Q. Very slight grade, if any?
A. Yes, sir.
Q. You say, after you had gone a little ways, the engineer give her a little more steam?
A. Yes, sir.

57 Q. You were going north of the yards to set out a car and take on a car?

A. Yes, sir.

Q. You noticed no jerk or jar in putting the steam on?

A. I noticed he gave her steam—he did—and we started out; I don't know how fast.

Q. I say, you didn't notice any jerks?

A. I couldn't tell no jerks on the engine.

Q. I say, you didn't notice any——

A. Not on the engine.

Q. —where you were; you examined both ends of the car, didn't you, the south end—the north end was the grab iron and the south end was the ladder?

A. Yes, sir.

Q. And you found everything connected with the ladder, all the rungs of the ladder and stirrup and handhold or grab iron at that end, in perfect order, didn't you?

A. That is what——

Q. On the south end of the car?

A. Yes, sir.

Q. And this grab iron on the north end had some play in and out, by reason of the pressure of the nut against the wood, I suppose?

A. Well, as near as I can remember, the hole that this bolt was in was worn a little.

Q. Gave some play?

A. Yes, sir.

Q. Did you take hold of it and try to pull it out?

A. Yes, sir.

Q. You couldn't do that?

A. No, sir.

Q. It was securely fastened there, except for this play?

A. Yes, sir.

Q. And, I suppose, when the man stood on the stirrup with his foot and held on to this with his hands, it would pull that

58 out as far as it would go, wouldn't it?

A. Not necessarily.

Q. If his weight was against it, wouldn't it?

A. It may have been in there straight down.

Q. Wouldn't there be some outward pressure—that is the only way you could support yourself, wasn't it?

A. No, sir.

Q. Suppose a man was standing there holding with his right hand and had his left hand extended, wouldn't that be supporting his weight on the grab iron?

A. Not near all of it.

Q. Well, except what is on his feet?

A. You can pull down on that and there wouldn't be no slip motion there.

Q. You mean to say you could stand on the stirrup and hold on to the grab iron and not pull the bolt out as far as it would go?

A. Yes, sir.

Q. You think you could?

A. Yes, sir.

Q. Well, was it loose in this hole—would it slide back and forth, easily?

A. It was, if you would pull out.

Q. Before you pulled it out, wasn't it loose there?

A. You wouldn't notice it before you pulled it out.

Q. I say, when you got hold of it and caught hold of it, it would pull out, wouldn't it?

A. It would pull out.

Q. And if you are lifting yourself, and a man got on the stirrup, he could get hold of the grab iron and pull himself up?

A. He would pull down, mostly.

Q. He would pull down and out, wouldn't he?

A. He wouldn't pull much out.

59 Q. This wasn't more than as high as your waist, was it—I will show you this picture here—there is no use of having two or three identical pictures here, however.

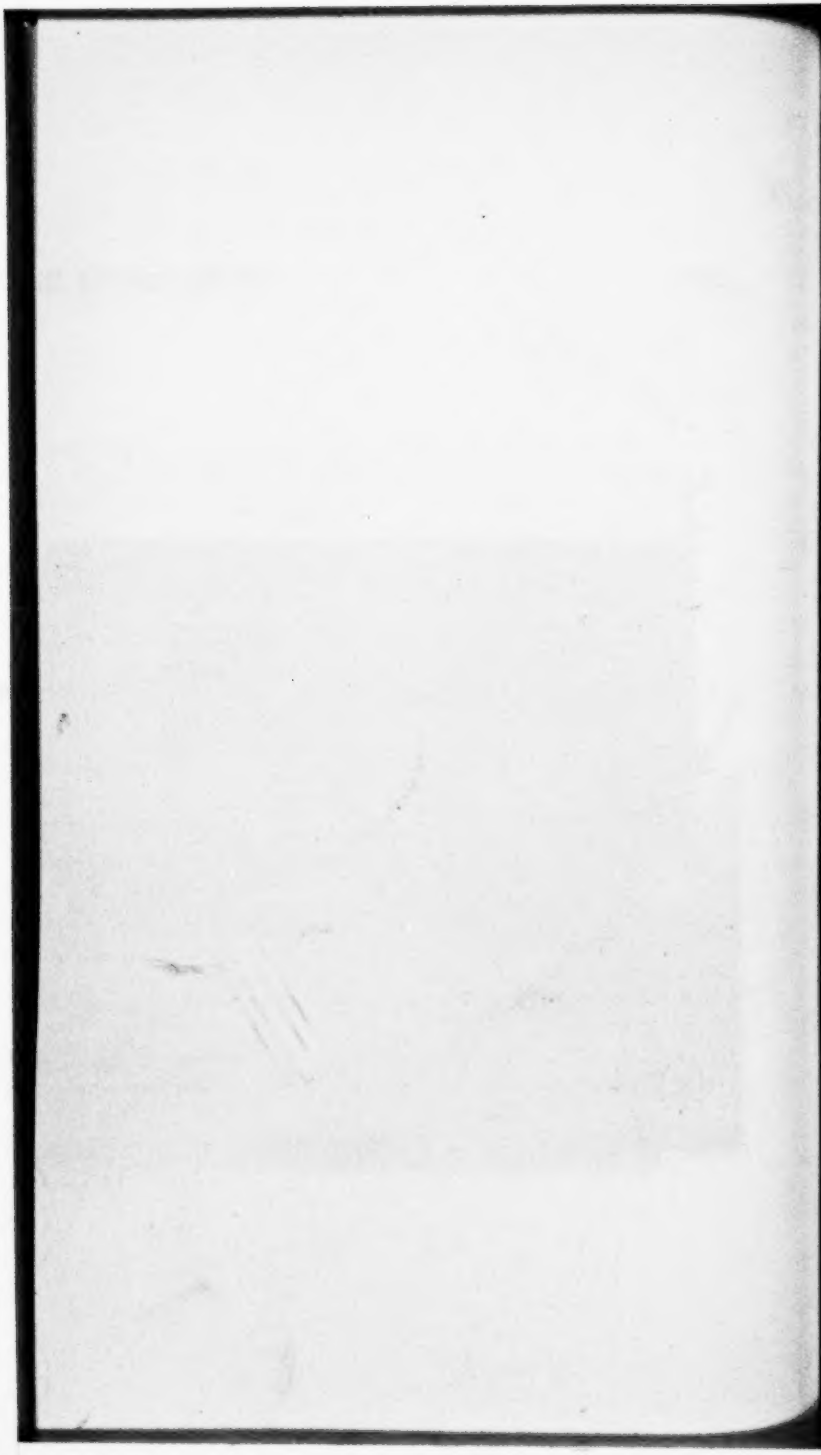
Mr. Able: Let the record show that by agreement of the parties, in place of the previous picture designated as Plaintiff's Exhibit "A," the one bears the car number B. & L. E., 80951, that we will use as Plaintiffs' Exhibit "A" the photograph offered by Mr. Hocker for use, marked "B. & L. E., 80993," and that we will indicate with an arrow on this new picture the same grab iron shown by an arrow on the previous picture.

Mr. Hocker: I will ask this be marked as "Plaintiff's Exhibit A-2."

(Said picture was marked by the stenographer as "Plaintiffs' Exhibit A-2.")

(See opposite this page.)

(Here follows picture, marked page 60.)



Mr. Hocker:

Q. Now, I will just have you look at this a moment, to see how high it is.

A. Well, that would be about eight inches or more, to there, and about two feet. That would be about a foot and a half, I guess; or something like that. That would be about four feet, or better.

Q. If you would take hold of this thing, which stood about—is that about four feet (indicating)—I am six feet tall?

A. That would be about four feet, to this.

Q. If you would put your foot up, either right or left foot, there any place around on the grabiron, you would exert pressure
61 in pulling yourself, wouldn't you, both feet?

A. Not necessarily, because when you get on you pull most of the pressure down.

Q. If you were here, four feet high, you wouldn't be pulling very much down, you would be exerting as much force out as you would down on it?

A. I don't think so.

Q. And you would be exerting sufficient force to pull this bolt out as far as the nut would let it go, wouldn't you?

A. Well, if it was pushed up close you could get on there and you could hold there and pull right straight down on it, and it might not pull straight out.

Q. But if you would stand on that thing, as you went up, on that stirrup, you would be in a crouching position?

A. You might be hanging down there and pulling down there.

Q. If you would stand on the stirrup—from the stirrup—how high is the stirrup from the ground?

A. Well, about, I should say that would be the top rail and it would be at least eight inches.

Q. Well, from the ground——

A. That would be close to two feet.

Q. Two feet from the ground?

A. Yes, sir.

Q. If it were two feet from the ground where you stood on the stirrup, your hand would be way down by the side, wouldn't you, if it were only four feet?

A. Yes, but you don't hang on the side of the car standing up. You hang down, with your weight down.

Q. But you would be holding yourself and supporting yourself from falling away from the car, simply by the exertion of holding on to the handhold, wouldn't you?

A. Not necessarily, I wouldn't.

62 Q. What would keep a man from holding away from the car; you couldn't stand up straight without holding on to anything?

A. You would hold right down, and the weight on the stirrup and grabiron.

Q. Your feet would be resting on the stirrup, and the stirrup would keep you from falling straight down, but you would be sup-

posed to prevent yourself from falling sideways by holding on to the grabiron, wouldn't you?

A. You wouldn't take much pressure to hold yourself up there.

Q. That is all you know about this matter, is it?

A. Yes, sir.

Redirect examination.

By Mr. Able:

Q. I will ask you to look at Plaintiffs' Exhibit "A-2" which I now offer in evidence; tell us whether or not that, is the picture of the same car that you examined?

A. (Refers to memorandum.) Yes, sir,

Q. It shows the car number there as being that one, isn't that correct?

A. Yes, sir.

Mr. Hocker: That is the same car.

Mr. Able:

Q. And which handhold was it that you have described here?

A. This one, that the arrow points to.

Q. And which end of that handhold was the end that pulled out about an inch?

A. This north end of it.

Q. Now, would it make any difference—Mr. Hocker has asked a considerable number of questions about what would happen when a man got hold of the handhold and holding on to the grab iron; would it make any difference if the man in getting on had grabbed near the opposite end from this point there; would that
63 make any difference whether it pulled out immediately or not?

A. Yes, sir; it would.

Q. If he would put most of his weight on this end in getting on, it might not pull out, is that correct?

A. Yes, sir.

Q. And then if in moving along there, some unusual jerk or jar, might cause that end to pull out, is that correct?

A. Well, he wouldn't be putting much weight on there to hold on to the car.

Recross-examination.

By Mr. Hocker:

Q. How long is that grab iron?

A. I don't know, sir; I think twenty inches, or two feet.

Q. Twenty inches?

A. Something like that. I wouldn't say for sure.

Q. But if you had hold of the grab iron at the end which wasn't loose—near that end—if the other end would come out an inch, it

wouldn't affect the end where you had your hand, very much, if it was twenty inches away?

A. Not if he didn't have much weight on it.

Q. Well, even if you had weight on it, if your hand were down at the tight end twenty inches away, and there was loose play, that wouldn't affect your hand very much?

A. Not that I know of.

Redirect examination.

By Mr. Able:

Q. But if you had happened to move along there and move this hand up to this loose end it would affect it, wouldn't it?

A. Naturally.

64 LEE A. WOLFE, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Able:

Q. Will you state your name, please?

A. Lee A. Wolfe.

Q Where do you live, Mr. Wolfe?

A. East St. Louis.

Q. Where are you working at this time?

A. For the Missouri Pacific.

Q. Where?

A. At Dupo, Illinois.

Q. What kind of work?

A. Clerk.

Q. What kind of work, did you say?

A. Clerk.

Q. Now, who were you working for on March 14th, 1918?

A. Chicago & Eastern Illinois Railroad Company.

Q. That is, that road being operated by the Director General?

A. Yes, sir.

Q. How long had you been in their employ, or when did you first go to work for the Chicago & Eastern Illinois Railroad Company?

A. Well, I think it was in October or November, in 1905.

Q. Had you been working for them continuously after that?

A. Yes, sir.

Q. And up to the time you were injured?

A. Yes, sir.

Q. That is about how many years?

A. Well, about thirteen years.

Q. What position did you hold with them when you first started to work?

A. Brakeman.

Q. And at the time this accident occurred you were holding what position?

A. Conductor.

65 Q. And what were your wages there as a conductor at the time this accident occurred?

A. Well, they run around two hundred and a quarter to two hundred and fifty dollars, something like that.

Q. That included everything; was there any overtime that you made?

A. Overtime and all.

Q. Now, does the same position include about the same amount of overtime that you actually put in, prior to this time?

A. Well, one hundred and forty-one dollars, that is the salary now.

Q. That one hundred and forty-one dollars is what?

A. That is the salary.

Q. What salary?

A. Well, that is, without any overtime.

Q. With what company?

A. With the Missouri Pacific.

Q. That is, the job that you are in now?

A. Yes, sir.

Q. You possibly misunderstood my question; my question is, what the previous position as conductor pays now with the Chicago & Eastern Illinois Railroad Company, for the same job that you were holding with them, with the average amount of overtime?

A. With the average amount?

Q. Yes.

Mr. Hocker: If you know.

Mr. Able:

Q. If you know.

A. Well, of course, I don't know exactly now. It pays one hundred and eighty-five dollars without any overtime.

Q. Without any overtime?

A. Yes, sir.

Q. And about how much would the average amount of overtime come to?

A. Well, what we was making at—we were working about fourteen or fifteen hours at that time; that is, on an average.

66 Mr. Hocker: You mean week or what?

Mr. Able:

Q. A week or a month?

A. A day.

Q. You were making on an average about fourteen hours a day?

A. Yes, sir.

Q. And that would come to about what, now, with the overtime?

A. Well, I couldn't say exactly.

Q. You know how much per hour they are paying now for that same work?

A. Well, no; it is about one hundred and eighty-five dollars a month and time and a half for overtime now.

Q. Well, now, what—time and a half for overtime and that is figured as overtime, all over eight hours?

A. Yes, sir.

Q. A day?

A. Yes, sir.

Q. And what is the straight per hour time?

A. Well, I wouldn't know until I figured it.

Q. Can you figure it right there and tell us?

A. Well, no; I couldn't orally, hardly.

Q. You couldn't without pencil and paper?

A. No, sir.

Q. Now, were you a member of the crew of train number—what was the train number you had?

A. Number 160.

Q. Going north to Bourbon, Illinois, were you?

A. Yes, sir.

Q. What did this train do first as you reached Bourbon, Illinois?

A. Stops to take water.

Q. And then what did it do?

A. Well, after we got done taking water——

Q. State first what you were doing while the train was taking water?

A. I walked up alongside the train to take some seal records.

Q. And of what cars?

A. Of the cars we had picked up at the next station back, at Arthur, Illinois.

67 Mr. Hocker:

Q. You say you walked up; did you walk from the caboose or from the engine?

A. Sir?

Q. You say you walked up—from the caboose?

A. Yes, sir; from the caboose; yes, sir.

Mr. Able:

Q. And about how many cars did you pick up at Arthur?

A. Six, I think.

Q. Now, as you were taking those seal records, what occurred?

A. He started to pull out.

Q. What did you do then?

A. Well, I got on the car and started to ride up to the station.

Q. What car did you catch onto?

A. B. & L. E., 80993, I believe the number of it was.

Q. Is that the car that is shown in Plaintiff's Exhibit "A-2?"

A. Yes, sir; that looks like the car.

Q. And where did you catch onto that car?

A. On the north end.

Q. Well, is that indicated there—is there anything on this picture to indicate it?

A. How do you mean?

Q. You said the north end; is that the end where the arrow is shown here?

A. Yes, sir.

Q. And what did you do then?

A. Well, I run up to the station.

Q. And about how fast was the train running along there before you got to the station?

A. Oh, I judge four or five miles an hour, something like that.

Q. And as you approached the station, what, if anything, did you do?

A. Gave a stop signal.

Q. And explain to us how that stop signal is given.

A. Well, it is given with a signal like this (indicating).

Q. And you are indicating by raising and lowering your right hand?

A. Yes, sir.

Q. At that time you were—which hand did you give the signal with?

A. The left hand.

68 Q. And what were you doing with your right hand?

A. Holding on to the car, or the grab iron.

Q. That is the grab iron that is shown on here with the arrow on it?

A. Yes, sir.

Q. On Plaintiff's Exhibit "A-2?"

A. Yes, sir.

Q. Now, is that stop signal—do you just give the signal and quit, or is that a continuous proposition?

A. Well, you give a signal until the engine crew acts on it.

Q. Until the engine crew acts on it?

A. Yes, sir.

Q. State how long did you give the stop signal?

A. Well, I give it for a car length or more there.

Q. And at the time the accident occurred, what were you doing?

A. Giving the stop signal.

Q. And now, after you started—state whether or not there had been any slackening of the train at all after you had given the stop signal?

A. Yes, sir; the slack run up like it was going to make a stop.

Q. And what, if anything, can you say with reference to the slack in the car? Were the cars compressed against the engine, or were they all drawn out?

A. The slack was all run up.

Q. By "run up" you mean that the weight of the cars were against the engine?

A. Yes, sir.

Q. Now, you say you were giving a stop signal when the accident

occurred. What, if anything, occurred just prior to the time that you fell off the side of the car?

A. Well, the train gave a sudden jerk.

Q. And what did that do to the other cars when the train gave a sudden jerk?

A. Well, it stretched out the slack.

69 Q. And what occurred at that time? What happened to you?

A. Well, I fell off the car.

Q. And do you know how you fell, whether you fell on your face or on your back, or how?

A. I fell on my back.

Q. And what happened to your left arm?

A. It was run over.

Q. Do you know what wheel or wheels ran over your left arm?

A. Well, not exactly. I think it was the second wheel of the head trucks of this car.

Q. What do you mean by the head trucks?

A. Well, the trucks on the north end of the car.

Q. And which wheel is the second wheel? Which way do you count? Do you begin at the head end of the car?

A. Yes, sir.

Q. What did the wheel do to your arm?

A. It ran over it and cut it off.

Q. And what did you do?

A. Well, I got up as soon as I could.

Q. And what happened after that?

A. Well, I got up and started to run towards the depot, and I run right into Jess Hammer and told him. I said: "You will have to get me over to Bourbon, or I will bleed to death, if you don't."

Q. What did they do with you then?

A. Well, they put me on the caboose and started to Bourbon—or for Tuscola, I should have said.

Q. Well, then, you were taken to the hospital somewhere, were you?

A. Yes, sir.

Q. And what was done to your left arm?

A. They operated on me.

Q. Or what was left of it?

A. I was operated on and sewed up.

70 Q. And how close is your left arm off at the shoulder?

A. Right at the shoulder joint.

Q. Then there is none of your left arm there at all?

A. No, sir.

Q. And how soon after that did you get work of some kind?

A. I guess, about four months, or something like that.

Q. And who did you go to work for four months later?

A. Missouri Pacific.

Q. And how much was your salary at that time?

A. One hundred and five dollars.

Q. And about how long was it $105.00?

A. Well, I don't know—it was several months at $105.00.

Q. And after those several months, was there any increase in your salary?

A. Yes, sir.

Q. How much was that?

A. One hundred and fourteen dollars.

Q. And how long was it $114.00?

A. Well, I think it was $114.00 about a year, as near as I could state—I don't know the dates.

Q. And how many days a week do you work in your present job?

A. Seven days.

Q. And how many hours a day do you work in this job?

A. Eight hours.

Q. Now, the Chicago & Eastern Illinois Railroad Company tracks, they run from and into what other states, out of the State of Illinois?

A. Well, in Indiana and Missouri.

Q. Indiana and Missouri?

A. Yes, sir.

Q. To what towns in Indiana do the tracks of the Chicago & Eastern Illinois Railroad Company run?

A. Well, they run to Terre Haute and Evansville and Brazil.

71 Q. All of those points are in Indiana?

A. Yes, sir.

Q. Now, did you make any kind of a record of the cars that you had in your train that you were conductor on, on and prior to this accident?

A. Make what we call a wheel report.

Q. And how many copies or duplicates of the wheel report do you make?

A. Two.

Q. And those two were sent where; where are they kept?

A. One goes to the—well, I make three, altogether.

Q. Three altogether?

A. Yes, sir.

Q. One goes where?

A. To the car accountant.

Q. And where is his office?

A. Chicago.

Q. Where does the other one go?

A. To the division superintendent.

Q. And this third is your own copy of it?

A. Yes, sir.

Mr. Able: I will ask that this be marked "Plaintiff's Exhibit B," two pages.

(Said paper is marked by the stenographer "Plaintiff's Exhibit B," two pages.)

Mr. Able:

Q. I will ask you to take Plaintiff's Exhibit "B," and just tell us what cars you had in your train at the time this accident occurred, that is, by giving the car numbers and initials?

A. All of them?

Q. Of the ten cars that were in there at the time the accident occurred?

A. C., St. P., M. & O., 27896; P. F. E., 11128; Erie, 105858; N. Y. C., 106163; U. P., 15313; C. & E. I., 65541; C. & E. I., 79573; B. & L. E., 80993.

Q. That one just read, is that the car that is shown in Plaintiff's Exhibit "A-2"?

A. Yes, sir. A. C. L., 34532; P. R. R., 89541; L. & N. 4458.

72 Q. You have read us the number of how many cars?

A. Eleven cars.

Q. And those eleven cars are the ones in the train at the time the accident occurred?

A. Yes, sir.

Q. Now, this exhibit, Plaintiff's Exhibit "B," shows other cars in addition to the ones that you have read, does it—it shows more cars than these eleven you have given us?

A. Yes, sir.

Q. What happened to the other cars that are shown on this wheel report that you didn't read us?

A. They had been set up at local stations before we arrived at Bourbon.

Q. At previous stations you had set those cars out?

A. Yes, sir.

Q. And your wheel report there shows just where each of those cars were set out, does it?

A. Yes, sir.

Q. And how is that designated on the wheel report?

A. Well, what we call a station number.

Q. These stations are numbered, and you can tell by those numbers where you left each one of those cars?

A. Yes, sir.

Q. Does this wheel report show the destination of this B. & L. E. 80993?

A. Yes, sir.

Q. What does it show as its final destination?

A. Terre Haute, Indiana.

Q. And what was that car loaded with?

A. Corn.

Q. That is also shown here on this wheel report, is it?

A. Yes, sir.

Q. Were there any other cars in this train—any of those other eleven cars that were still in the train, that contained interstate freight?

A. Well, I had a couple of local merchandise cars—waycars, we call them.

73 Q. Were there any shipments in any of those local merchandise or waycars that were to go out of the State of Illinois?

A. Yes, sir.

Q. Now, these waycars are cars that you open up at various stations and take in and put off freight; is that correct?

A. Yes, sir.

Q. And the cars that you don't open up, full cars, you don't call those waycars?

A. No, sir.

Cross-examination.

By Mr. Hocker:

Q. Mr. Wolfe, as I understand your testimony, this is a picture of the car that was in your train?

A. Well, that looks like the car; yes, sir.

Q. Well, it is one that you produce as the picture of that car, and so far as its appearance goes it resembles, at least, the car that you were on?

A. Yes, sir.

Q. And as the car was made up in the train, it was headed north; that is, generally speaking?

A. Yes, sir.

Q. It might make a turn and go east and west but its general direction was north?

A. Yes, sir.

Q. And as this car was placed in the train, this end where the arrow is, was the front end?

A. Yes, sir.

Q. And the end where the ladder is was the rear end?

A. Yes, sir,

Q. In other words, the end here where the arrow is was towards the engine, and the end where the ladder is was towards the caboose?

A. Yes, sir.

Mr. Hocker: Mr. Able, do you have any objection if I wrote on this "Front" and "Rear"?

74 Mr. Able: No, I think that would be fine. Shall I mark it in ink for you? Shall we also put "North" and "South" up there?

Mr. Hocker: Yes.

Mr. Hocker:

Q. So that this Exhibit "A-2" now indicates by marks the south end of the car and the rear end of the car with reference to the train?

A. Yes, sir.

Q. And the north, which is the front end of the car, with reference to the train?

A. Yes, sir.

Q. Now, where this arrow is pointing appears a handhold or grab iron on the car?
A. Yes, sir.
Q. And that, as I understand your testimony now, was where you were standing?
A. Yes, sir.
Q. Holding onto the grab iron with your feet in the stirrup?
A. Yes, sir.
Q. Holding on with your right hand?
A. Yes, sir.
Q. The car going in that direction and giving this signal, which you have described, with your left hand?
A. Yes, sir.
Q. Now, at the time of this accident you were taking—at the time the train started up you were taking the seal numbers of the cars, as I understand?
A. Yes, sir.
Q. You had been taking the seal numbers of the other cars back of it?
A. Yes, sir.
Q. And were taking the seal numbers of the cars when it started up?
A. I had taken it; yes, sir.
Q. Where is the seal?
A. Right here (indicating).
Q. You indicated on the door there?
A. Yes, sir.
Q. You went from Bourbon to Tuscola, was that the nearest place?
A. Yes, sir.
Q. On this train?
A. Yes, sir.
75 Q. And you were headed towards Tuscola at the time?
A. Yes, sir.
Q. And I suppose all work was abandoned; that is, there was nothing further done?
A. No, sir.
Q. You were taken to Tuscola and you took a passenger train?
A. Yes, sir.
Q. You got doctors there, first?
A. Yes, sir; I got a doctor there first.
Q. And had some emergency treatment there?
A. Yes, sir.
Q. And then did the doctor go on with you to Pana?
A. Yes, sir.
Q. The same day?
A. Yes, sir.
Q. What time of day was it that the accident happened?
A. Well, as near as I could tell, about three o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. And you went to Pana and got there about what time?

A. Well, it must be around six o'clock; something like that.
Q. You went in the hospital and were operated on, were you?
A. Yes, sir.
Q. At once?
A. Yes, sir.
Q. That evening?
A. Yes, sir.
Q. You remember about three days later making a statement with reference to how the accident happened?
A. Yes, sir—well, I signed a statement that was made.
Q. I am going to show you this statement and have you look at the various pages of it, where a signature appears, and ask you if that is your signature and if that was signed by you?
A. Yes, sir.
Q. And I will ask you that with reference to the second page as well as the first?
A. Yes, sir.
76 Q. And the third page?
A. Yes, sir.
Q. And the fourth page?
A. Yes, sir.
Q. And the fifth page?
A. Yes, sir.
Q. And the sixth page?
A. Yes, sir.
Q. All of those are in your handwriting?
A. Yes, sir.
Q. All those signatures?
A. Yes, sir.
Q. Not the body of the instrument?
A. No, sir.
Q. Who was it that talked to you at the time the statement was made, Mr. Wolfe?
A. Well, it was Howard Swanson, the claim agent.
Q. You had known him some time, had you?
A. Yes, sir.
Q. How long have you known him?
A. Well, about seven or eight years, I guess.
Q. He had been in the claim department during that seven or eight years?
A. No, he had been trainmaster's clerk during the greater part of the time.
Q. How long had he been in the claim department?
A. Well, about a year, as near as I can remember.
Q. And he questioned you about how the accident happened, did he?
A. Well, he asked me some things about it, yes.
Q. And wrote down while he was questioning you?
A. Yes, sir.
Q. He wrote this here while you were in bed there at the hospital, did he?

A. Yes, sir.
Q. And while he was questioning you he wrote down what was in this paper?
A. Yes, sir.
Q. And after it had been written down and completed and you signed it, or before you signed it, did you read it?
A. No, sir.
Q. Didn't read it?
A. No, sir.
77 Q. Did he read it to you?
A. Yes, I guess he read it over, probably.
Q. I am going to ask you, Mr. Wolfe, how old are you now?
A. I am thirty-nine now.
Q. How old were you at the time this happened?
A. Thirty-seven.
Q. What is your birthday?
A. March 3rd.
Q. March 3rd; when did you enter the service of the company?
A. In 1905, I believe.
Q. November, was it?
A. October or November; I don't know which.
Q. And you became conductor when?
A. I became conductor, I think—it was in April, 1906, I think.
Q. And you had been in charge of trains Nos. 160 and 161?
A. Yes, sir; for some time.
Q. And what was the number of this train?
A. 160.
Q. And I suppose the train going in the reverse direction was number 161; is that correct?
A. Yes, sir.
Q. And you, before, some time before, had been in charge of 162 and 163, hadn't you?
A. Yes, sir.
Q. That is another freight run between the same points, was it?
A. No, that was another local.
Q. Between Findley and Salem that was?
A. Yes, sir.
Q. I am going to read this statement to you and ask you whether or not it was a statement that you made and signed at the time that Mr. Swanson questioned you: "Pana, Ill., Mar. 17, 1918. My name is L. A. Wolfe. I was 36 years of age on my last birthday which was the 3rd day of March. I am employed by the C. & E. I. Railroad as conductor and have been in continuous service since
78 November, 1905, as brakeman and conductor. I was promoted to position as conductor in April, 1906. I have been conductor in charge of local freight trains 160 and 161 running between Villa Grove and Pana for the past five years"?
A. Yes, sir; that long, anyway.
Q. "I had charge of local freight trains 162 and 163, running between Findley and Salem yard, previously to taking charge of trains 160 and 161, being on these runs for about a year."

A. Yes, sir.

Q. "In connection with accident which occurred at Bourbon on March 14th, when I sustained injury to my left arm. We were called to leave Pana on train number 160 for on time, which is 6.30 a. m."

A. Yes, sir.

Q. "Train consisting of about twelve cars, one empty and the balance cars loaded with merchandise and corn for various points."

A. Yes, sir.

Q. "When we arrived at Bourbon, in addition to taking water on engine 887"—was that the number of your engine?

A. Yes, sir.

Q. "It was the intention to set out a car of scrap iron at that point."

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. "And pick up a car of corn."

A. I think so; yes, sir.

Q. "But, owing to my accident, we did not do either. I do not recall at this time number of the car we intended to set out or number of the car that we were to pick up." You don't recall that now, I don't imagine?

A. No, sir.

Q. "The water crane is just about at the south end of the station platform, and the station track on which we were to pick up
79 the car of corn and set out the car of scrap is located on the east side of the northward main, and the switch leading from the northward main to this team track is located about twenty-five car lengths north of the station."

A. Something like that; yes, sir.

Q. That is approximately correct?

A. Yes, sir.

Q. "When we stopped to take water at Bourbon, I got off the caboose and started to walk up along the west side of my train between the northward and southward mains, as we had picked four or five cars at Arthur from the Vandalia and all around there loaded with flour and corn, and I wanted to get the seal record on these cars."

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. "I had not got more than three or four of these cars checked when the train started to proceed." It that right?

A. Yes, sir; something like that.

Q. Approximately, of course, you didn't know the exact number. "I do not know whether engineer whistled off before starting train or not. When train started up, I caught the south end of B. & L. E. car 80993."

A. I didn't give it to him that way; he wrote that in there, and I didn't write it.

Q. You signed that page which is right here; that statement I have just read is above your signature?

A. Yes, sir; that is right above the signature.

Q. "And I caught the south end of B. & L. E. car 80993, I think is the number, and got up on the ladder on the west side of this car at the south end with both of my feet on the lower grab iron next to the stirrup which is located on the end sill or lower corner of body of car. The train was moving possibly three or four miles an hour when the car I was riding on approached the station and as
80 I was approaching station the agent came out of the station building with a bill and message in his hand to hand to me and I had a bill in my hand to give him. It was the intention to make the exchange of bills as I passed by as the waybill he had covered car I was to pick up and the one I was to hand him covered the car I was to set out. The car I was on was a pretty high car and I was holding on to possibly the fifth or sixth grab iron, with my right hand, and as I leaned toward the agent who was standing in between the two main tracks in front of the station to hand him the bill I had with my left hand and receive the one he had, both of my feet must have slipped off the grab iron, as the grab irons and stirrup on the side and end of the car I was riding were in good condition, and as I fell to the ground I must have turned around as I was in a sitting position facing the south, as I remember I could see the car that was next to the one I was riding, coming towards me, but as I fell between the car I was riding and the one next to it, I was unable to get my arm off the rail on account of the car being so close and the north wheel on west side of this car following or possibly the north truck passed over my left arm right at the shoulder. I was taken to Tuscola and given first aid attention there. I was then placed on number 21 for Pana and taken to the hospital where my arm was amputated about 7 o'clock the same evening by Dr. L. H. Miller." Each one of the pages, I believe you have stated, is your signature?

A. Yes, sir; I signed them.

Q. When Mr. Swanson read this over to you after he had made these notes and writing, did he read it over to you as it is
81 here?

A. Well, he might have, I wasn't—I couldn't tell at that time whether he did or not, but that is in the statement—you see, Mr. Swanson wrote that statement himself.

Q. Yes, I understand.

A. And that isn't the statement I give him if he wrote it down that way.

Q. Well, you only signed one paper there, one series of papers?

A. Yes, sir; I signed each one of those.

Q. He, as I understand it, read it; you were conscious and capable of carrying on a conversation?

A. No, not exactly I wasn't at that time.

Q. This was on the seventeenth?

A. This was on a Sunday morning; yes, sir; early Sunday morning.

Q. And was anybody else there when this statement was taken?
A. No.
Q. Just you and Mr. Swanson?
A. No, they wouldn't allow anybody in the room at that time—no visitors at all.
Q. And how long did this conversation take place between you and Mr. Swanson?
A. Oh, I don't know. He might have been there on hour. I couldn't say exactly.
Q. And you undertook to tell him, so far as you could, or remember, about the accident, didn't you?
A. No, I didn't tell him anything about it. He just asked questions and wrote it down.
Q. And you answered his questions, did you?
A. I probably did, I don't remember now.
Q. And you gave him as full answers as you were able, as you recollected it?
A. Yes, sir.
Q. You tried to tell truthfully what you knew about how the thing occurred?
A. As far as I remember I told him how it was; yes, sir.
82 Q. And your present recollection is that you did not tell him that part of the story in which you said you were on the ladder?
A. No, sir.
Q. There is and was a ladder on the north or south end of the car?
A. Yes, sir; south end of the car.
Q. And rungs at convenient intervals to climb up the ladder on?
A. Yes, sir.
Q. And a very much more convenient place to ride, because you can get in a more comfortable position than you can with one of the grab irons?
A. Yes, sir.
Q. It is in a more convenient place to ride on this ladder than on the grab iron on the other end of the car?
A. Yes, sir.
Q. You think you told him at that time that you were not on the ladder?
A. I don't remember telling him I was on the ladder; no, sir.
Q. You don't remember telling him you were on the ladder?
A. No, sir.
Q. And you don't remember telling him you were on the south end of the car?
A. No, sir.
Q. You wouldn't say now that you didn't tell him that, would you?
A. No, because I don't remember at that time, what I told him at that time.
Q. But I say you wouldn't say that you didn't tell him just what is in this statement?

A. Well, I give it to him just like it was, and he might have wrote it down different from what I give it to him.

Q. He might have, yes; but you wouldn't say, would you, Mr. Wolfe, that this statement wasn't given by you as Mr. Swanson wrote it down at that time?

A. No; I don't think I gave him that.

83 Q. You are not sure about it, then?

A. No, I am not sure about it. I wasn't in a position to be sure about it at that time.

Q. But you were able to converse with him and tell him, and you then remember- about it, weren't you?

A. Well, yes; he came in there.

Q. You talked to the doctor about it, didn't you, and he asked you during the treatment there in the hospital, and didn't you tell him how the accident happened?

A. No, I don't know as I did.

Q. You don't remember that you did?

A. No.

Q. You have no recollection of telling anything about it?

A. No.

Q. Will you describe that stop signal that you say you were giving?

A. Well, that is the stop signal (indicating).

Q. This way (indicating)?

A. Yes, sir; up and down.

Q. Up and down?

A. Yes, sir.

Q. Now, was Mr.—what is that station agent's name?

A. Blackwell.

Q. Were you exchanging bills with Mr. Blackwell or receiving bills from him?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Did you see Blackwell there at the time?

A. About—I don't remember seeing him before this, no.

Q. Before the accident?

A. No.

Q. And you are quite certain now you were not in the act of exchanging or about to exchange a bill, leaning out and reaching it to him, and he was standing about to reach it up to you, when the accident happened?

A. Yes, sir.

84 Q. But you wouldn't say you didn't tell Mr. Swanson anything like that in making this statement, that that is what you were doing?

A. I don't remember what I told him.

Q. You wouldn't say you didn't tell him that; you simply say you don't recall what you may have said to him in that regard?

A. I don't remember.

Q. The time this train started you were taking the seal number on this particular car?

A. I had—no, I had taken it already—already taken it.

Q. Your deposition was taken last Saturday morning, was it?

A. Yes, sir.

Q. And you were asked this question: "Q. Now, explain, please, Mr. Wolfe, just how this accident occurred; tell us all about it. A. Well, we pulled in at Bourbon and stopped and took water and started ahead, and I walked up the side of track, getting some seal records on these cars that we picked up at the station back; and after we got done taking water we started to pull up at the station, and after I had just taken the seal record of this—well, B. & L. E.—I just caught on this car to pull up by the station, and as we got nearing the station I gave a stop sign." Is that right?

A. Yes, sir.

Q. Now, what were you intending to stop at the station for; what did you want to stop this train at the station for?

A. Well, it is customary to stop it to find out if they had any freight to load.

Q. You intended to set out a car at the north end of the station and to take one up?

A. Yes, sir.

Q. How did you know that you had to get this car on?

A. I didn't know it at that time.

Q. How?

A. I didn't know it at that time.

85 Q. You didn't know at that time?

A. No, sir; not at that time, no.

Q. All you knew was that you had a car to set out?

A. Yes, sir.

Q. And you learned afterwards that there was a car there for you to pick up?

A. Yes, sir.

Q. And as I understand you, you intended to get off there?

A. Yes, sir.

Q. And to speak to the agent?

A. Yes, sir.

Q. And that he wasn't in sight when you came by?

A. I didn't notice him.

Q. And you weren't in the act of handing him anything?

A. No.

Q. He wasn't in the act of handing you anything when this happened?

A. No, sir.

Q. And you were not on the south end of the car, as you stated here, but were on the north end, holding on to the one grab iron that was on that end?

A. I didn't say I made that statement; no.

Q. I don't want to misrepresent you, but isn't that in this statement that you signed?

A. That is the statement, yes.

Q. I don't want any more than the facts, but I also understand you to say you didn't say that you did not make that statement, but you didn't simply remember?

A. I say I didn't know that.

Q. Now, Mr. Wolfe, I want you to look at this photograph of the car and tell me a little about it; this car was going north?

A. North; yes, sir.

Q. And you were here?

A. Yes, sir.

Q. Where the arrow points?

A. Yes, sir.

Q. Now, it was your impression, as I gather from your direct examination, that when you fell you went under here and
86 one of the rear trucks, was it—the rear wheel ran over your arm?

A. I said I thought it was, but I don't know exactly.

Q. That would be this one here?

A. Yes, sir.

Q. There is a coil spring which seems also to be a support for some long springs in the car there?

A. Yes, sir.

Q. And how high is the bottom of this coil spring from the ground?

A. Oh, from the ground?

Q. Yes.

A. Well, I would judge it was eight or ten feet; something like that.

Q. And how far out does it come with reference to the side of the body of the car?

A. Well, it won't hardly reach out to the side—it may—it is just about even with the side.

Q. And doesn't project beyond the sides, perhaps, but it is about even with the perpendicular side of the car?

A. Yes, sir.

Q. And it is your impression that this rear wheel—the second wheel of the truck—rather than the first, went over you?

A. I think so, but I don't know for sure.

Q. Of course, if you had been on the south end of this car, where this ladder is, there would have been a space in between this car and the next car—that is, in the coupling space—which is about what distance, two or three feet?

A. Well, yes; something like that; a couple of feet, probably not so far when the cars are slacked up.

Q. And anyone falling there, if they fell between the cars, would be in danger of trucks or wheels under the car following immediately behind, wouldn't he?

A. Well, if they fell in there on the rail, they would.

87 Q. Could you indicate that on your other arm, your right arm, where this arm was cut?

A. Well, as near as I know, it was crushed right near the shoulder.

Q. About up as close to the shoulder as it would be possible to get it?

A. Well, yes, as near as I know. I couldn't say, only what I have been told.

Q. Did you faint at any time?

A. Not any.

Q. You kept your senses during the whole time, but you were greatly shocked and excited, of course?

A. Well, of course, a man wouldn't be at his senses, but I didn't feel——

Q. I didn't mean the normal senses, but you weren't unconscious or fainted at any time?

A. No, sir.

Q. I have here a statement of your earnings from March, 1917, to March, 1918; were you paid twice a month?

A. Yes, sir.

Q. Will you be good enough to look at that and see if that is correct, to your recollection, of what you received?

A. Well, of course, I haven't got the record with me.

Q. I don't mean exactly, but approximately?

A. No, I couldn't say that; I don't know. We got a lot of back time in there.

Q. What do you mean by back time?

A. Well, back time was allowed; that the government allowed.

Q. Retroactive?

A. That the government allowed.

Q. That is to say, the government allowed you some wages for work previously done for which you hadn't been paid?

A. Yes, sir; that hadn't been settled.

Q. That you hadn't been paid the full price for?

A. Yes, sir.

Q. Well, of course, assuming that that doesn't enter the earnings during the period, that would be compensation from earn-
88 ings which you had made before this period I am speaking of, wouldn't it?

A. Well, I don't know.

Q. This overtime that you were allowed, was it for services that had been rendered in the past when you got it?

A. It wasn't what you call overtime; no.

Q. Well, back time?

A. Back time.

Q. It wasn't overtime, but back time; that is to say, the government took the position that during certain periods before you had not received sufficient compensation, and it undertook to give you what you would have gotten then if you had gotten at the rate which the government fixed; isn't that right?

A. Yes, sir.

Q. So that was not compensation for this period, although you received it during this period, but it was earned during a previous period, as having been earned during that period?

A. Yes, sir.

Q. Isn't that correct?

A. Well, I have understood it was.

Q. I don't know whether that is plain, but I meant it to be; the government—when did the government take over the railroads; do you remember?

A. No, I think it was in——

Q. Was it January 1st, 1916?

A. I believe it was.

Q. And this statement from March, 1917, to January, 1918, didn't have any back time in it, did it?

A. Let's see—January first, 1918? No, it was long before that.

Q. At any rate, that back time was time that had been earned during other periods?

A. That was about September when I got a lot of back time.

Q. September, when?

A. September, 1917, something like that, when we got the
89 eight-hour schedule from a ten.

Q. Would you be good enough to look at this and, forgetting for the time being this back time, which has nothing to do with your earnings prior, although received during that period, would you be able to tell whether this represents correctly——

A. No, I couldn't tell.

Q. You wouldn't say it does or doesn't?

A. No; I don't say it doesn't or does, because I don't know.

Mr. Hocker: I will ask this statement be marked "Defendant's Exhibit No. 2."

(Said paper is marked by the stenographer "Defendant's Exhibit No. 2.")

Redirect examination.

By Mr. Able:

Q. This Mr. Swanson is in the court, isn't he, and he was here yesterday?

A. Yes, sir.

Q. And the claim agent that took that statement?

A. Yes, sir.

Q. I don't know whether I asked the date of the accident, what was that?

A. March 14th, 1918.

Q. You say this statement was taken at the hospital three days after you were injured?

A. Well, that was the morning of the third day; yes, sir.

Q. And at that time, did I understand you to say that no people had been—no visitors had been allowed in your room?

A. Not even my father and mother; they were there and they wouldn't let them in; no sir.

Q. Did you or did you not at that time give the facts as you knew them, as near as you could?

A. Well, of course, I don't remember what he wrote down.
90 I give him as near as I could, but I don't know what he wrote down.

Mr. Able: I wish to offer in evidence at this time Plaintiff's Exhibit "B." That is the wheel report that has already been introduced.

(Said Plaintiff's Exhibit "B" is in words and figures as follows: Omitted by consent.)

Mr. Able:

Q. Now, I wish you would state whether or not, Mr. Wolfe, there was any—you had any warning or notice of any kind that this train was about to suddenly increase its speed about the time the accident occurred; did you know that it was going to do that or have any warning of it in any way?

A. No, sir.

Q. Was that the usual thing or the unusual thing in regard to having a train back up and start at that point, without a signal?

A. Well, it was an unusual occurrence.

Q. Now, what, if anything—which direction were you looking while you were giving that signal?

A. North.

Q. And looking at whom?

A. The fireman.

Q. And what was the fireman doing?

A. He was looking back at me.

Q. And where was the fireman sitting?

A. He was on the seat box, on the engine.

Q. What is his name?

A. H. E. Scott, I believe.

Q. Has he been in court for the last day or two?

A. I haven't noticed him.

Q. Is he still working for the C. & E. I.?

A. Yes, sir.

Mr. Hocker: He is here, I think, Mr. Able.

Mr. Able:

Q. As you approached the station there was it customary
91 and usual to stop, or not?

A. Yes, sir.

Q. How would you know whether or not there was any freight to be picked up at the station to put in any of these waycars?

A. I wouldn't until we stopped to find out, unless I walked up to the station previous to that and found out.

Q. And if there was any freight to put in any of these waycars, any small pieces of freight, where would your train be while you were putting that in?

A. Right on the main line, right in front of the station.

Q. At the place where you say you gave the stop signal for them to stop?

A. Yes, sir.

Q. Had you been up there previous to find out if there was any stuff there or not?

A. No, sir.

Q. And this team track, where you were going to leave a car, how far was that away from the station?

A. Well, about twenty-five or thirty car lengths; something like that.

Q. Which direction?

A. North.

Q. Then it wouldn't be customary to pull straight down there twenty-five or thirty car lengths and carry freight all the way from the station down those twenty-five car lengths, would it?

A. No, sir.

Q. Then the purpose in giving the stop signal was to come to a stop so you could load on any freight if necessary, at that point?

A. Yes, sir.

Q. Now, as you were going north there and giving that stop signal with your left hand, what were you doing with your right hand?

A. Holding on to this handhold.

Q. And the handhold, is that called anything else at times?

A. Grab iron.

92 Q. Grab iron and handhold means the same thing?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. I wish you would just describe in detail—I don't remember that you did before—what occurred when the train suddenly started forward.

A. Well, something kind of gave way—either the handhold or grab iron give, and caused my foot to slip.

Mr. Hocker:

Q. What is that?

A. That handhold give and caused my feet to slip off the step and threw me right around on my back.

Mr. Able:

Q. Well, now, the point I am getting at is, do you know what caused it to throw you on your back?

A. Well, something—something gave and jerked my hand loose.

Q. If I may direct him just a little further—do you know whether you were able to hold on for a little while or whether you immediately fell off?

A. Well, just an instant, probably.

Mr. Hocker:

Q. It isn't clear to me what you did for an instant, do you mean you held on for an instant after your feet slipped off?

A. I said "probably"; yes, sir.

Mr. Able:

Q. Bourbon, Illinois, is in Douglas County, is it?

A. Yes, sir.

Q. And the State of Illinois?

A. Yes, sir.
Q. And Terre Haute is in the State of Indiana?
A. Yes, sir.

Recross-examination.

By Mr. Hocker:

Q. You mentioned about it being a custom to stop your cars to take on local freight; that is, way-freight; also it was a custom
93 where there was no way-freight or local freight to put into cars, for the station agent to come out and give you way bills for any full cars that you might have, or messages, or something, and give you a word, or something of that kind?
A. He is supposed to be out on the platform when the local comes through.
Q. So you wouldn't have to be delayed unless there was something to take into the train?
A. Well, of course, I don't know as to that.

Mr. Able: I object to that, because the defendant has alleged in its answer that it was the duty of this plaintiff to stop that train there. I don't think they ought to be allowed to contradict their own pleadings.
Mr. Hocker: Even so, if I want to be guilty of that inconsistency, which I think I am not.
Mr. Able: I will withdraw the objection.

Mr. Hocker:

Q. Where you had no local freight to deliver or to receive, it was the custom for the agent to come out and give you the bill for any cars you might have to pick up that were full?
A. He is supposed to be on the platform when the local arrives.
Q. What was your weight then?
A. Well, my weight—I weighed around about 145 or 150 pounds, at that time, I guess.

Redirect examination.

By Mr. Able:

Q. What was the custom with reference to stopping when you were transacting any business with the agent?
A. Well, of course, if you didn't know whether there was any freight to be loaded there you would stop to find out.
Q. Did you suffer any pain, Mr. Wolfe?
A. Well——
94 Q. I am asking you just for the record's sake. Of course, we all know it, but I would like the record to show whether or not you suffered any pain.
A. Yes, sir, I did; a great deal after the operation; yes, sir.

Q. What was the reason for excluding people from your room there?

A. Well, because I was so weak and so nervous they didn't want anybody to bother me then.

Q. Were you able to sit up then?

A. No, sir; unable to move.

Q. And how long after you operation, the accident, was it before you were able to sit up?

A. Well, it was—I think it was about a week and one day before I got out of bed.

Q. And how long was it after that you were able to sit up in bed?

A. Well, it was four or five days, something like that, or more; I don't know just exactly.

Q. Well, do you know whether or not you did sit up or were able to sit up while this statement was being taken?

A. No, sir.

Q. What do you mean by "no, sir"?

A. No, I wasn't able to sit up. I was propped up in bed two or three days before I got out of bed, with a pillow.

Q. Well, were you propped up at the time this statement was taken?

A. No, sir—I might have been propper up a little, because my arm hurt me so bad that I couldn't lay down—that is, to lay still.

Q. Do you know whether or not you had lost a quantity of blood by reason of the accident?

A. Yes.

Q. Was there any question, Mr. Wolfe, for awhile as to whether you would live or not as the result of this accident?

Mr. Hocker: We object to that.

95 Mr. Able: That might be proper, I just want to know the condition.

The Court: Objection sustained.

Mr. Able: I would like to have this marked as "Plaintiff's Exhibit C."

(Said paper was marked by the stenographer as "Plaintiff's Exhibit C.")

Mr. Able: I desire to offer in evidence at this time Plaintiff's Exhibit "C," which is the stipulation between counsel for the substitution of John Barton Payne, the designated agent, under section 206 of the Transportation Act of 1920, as the defendant. This stipulation was filed September 24th, 1920.

Said stipulation is in words and figures (caption omitted), as follows:

PLAINTIFF'S EXHIBIT "C."

Stipulation for the Substitution of "John Barton Payne, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act, 1920," as the Defendant.

The within action at law, based on a cause of action arising out of the operation by the president of the railroad of the Chicago & Eastern Illinois Railroad Company, in the operation of which the plaintiff, an employe, is alleged to have been injured, a carrier (under the provisions of the Federal Control Act, or of the Act of August 29th, 1916), was brought after the termination of Federal control against "Walker D. Hines, the designated agent under section 206 of
96 the Transportation Act, 1920," in accordance with section 206 of such Act, approved February 28th, 1920. Since the institution of this suit, the President has issued the following proclamation:

"By the President of the United States of America.

A Proclamation.

"Whereas, by Proclamation dated March 11th, 1920, Walker D. Hines, Director General of Railroads, was designated as the Agent provided for in Section 206 of the Transportation Act, 1920; and

"Whereas, the said Walker D. Hines, Director General of Railroads, as aforesaid has tendered his resignation as said Agent, which has been duly accepted, effective as of 18th of May, 1920;

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the power and authority vested in me by said Act, and of all powers me hereto enabling, do hereby designate and appoint, effective the 18th day of May, 1920, John Barton Payne, Director General of Railroads, and his successor in office, as the Agent provided for in section 206 of said Act, approved February 28, 1920.

"In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done by the President in the District of Columbia, this 14th day of May, in the year of our Lord, Nineteen Hundred and Twenty, and of the Independence of the United States the One Hundred and Forty-fourth.

[SEAL.] WOODROW WILSON.

By the President.
BAINBRIDGE COLBY,
Secretary of State."

97 It is therefore agreed by and between the plaintiff and the defendant that "John Barton Payne, Director General of Railroads, the designated Agent provided for in Section 206 of the Transportation Act, 1920," may be substituted as the defendant.

Dated this 22nd day of September, 1920.

SIDNEY THORNE ABLE,
CHARLES P. NOELL,
Attorneys for Plaintiff.
JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Defendant.

Plaintiff rests.

Thereupon, defendant offered and asked the Court to give an instruction in the nature of a demurrer to the plaintiff's evidence; which said demurrer is as follows:

Now at the close of the testimony offered by the plaintiff, the Court instructs the jury that under the pleadings and all of the evidence in the case, plaintiff is not entitled to recover and the verdict of the jury must be for the defendant.

Which said instruction the Court refused to give; to which ruling of the Court in refusing to give said instruction, defendant then and there duly excepted, and still continues to except.

98 Thereupon, defendant, to sustain the issue to be by its sustained, offered and introduced the following evidence:

Defendant's Evidence.

S. G. BLACKWELL, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. You may state your name.
A. S. G. Blackwell.
Q. Where do you live?
A. Bourbon, Illinois.
Q. Were you living at Bourbon on the 14th of March, 1918?
A. Yes, sir.
Q. What was your business at that time?
A. Station agent.
Q. You hold that position now?
A. Yes, sir.
Q. Are you located at Bourbon, Illinois, at this time?
A. Yes, sir; I am.
Q. I believe you are also the operator and also were the operator at that time?
A. Yes, sir.

Q. Do you know Mr. Wolfe, the plaintiff?
A. Yes, sir.
Q. How long have you been station agent at Bourbon?
A. Since 1904.
Q. Do you remember the occasion of a freight train, No. 160, coming through your station on the 14th of March?
A. Yes, sir.
99 Q. About what time of day did it arrive, Mr. Blackwell?
A. Well, it was about 3:10, I should judge, or something after 3 o'clock.
Q. Did you have any local freight for the train that day, way freight?
A. Way freight—no, we didn't have any.
Q. Do you know what the train did first when it arrived at Bourbon?
A. It took water.
Q. Where is the water tank with reference to the station?
A. It is south of the—at the end of the platform.
Q. That would be south of the station?
A. Yes, sir.
Q. And what direction was that train moving?
A. Moving north.
Q. Did you have any conversation with any of the train crew, any member of the train crew, before the train passed—with any of the brakemen? You needn't tell us what that conversation was, but did you have a conversation with the brakemen of that train?
A. Well, I don't remember at this time whether I did or not.
Q. What did you do, Mr. Blackwell?
A. Well, with reference to what?
Q. What did you do when the train arrived?
A. Well, I was watching to exchange bills with him, or whatever was to be done.
Q. What bills did you have?
A. I had a bill for a car of corn.
Q. Where was the car of corn?
A. It was on the station track.
Q. Where was it with reference to the station? Where was that track?
A. It was north or east of it.
100 Q. Did you have anything else to give to Mr. Wolfe?
A. Possibly a message.
Q. And then what did you do with reference to those messages?
A. I went out to exchange with him.
Q. You went out where?
A. To the track.
Q. Out from the station to the track?
A. Yes, sir.
Q. Had the engine passed when you went out?
A. Yes, the engine was by.
Q. Where was Mr. Wolfe when you first saw him?
A. He was hanging on the side of the car.

Q. On which side, west or east?
A. On the west side.
Q. Is that the same side that the station was on?
A. Yes, sir.
Q. How far south of you was Mr. Wolfe when you went out of the station?
A. Well, he was possibly two or three car lengths.
Q. South?
A. Yes, sir.
Q. And what was he doing at that time?
A. Well, he was hanging onto the side of the car.
Q. Did you notice whether or not he had anything in his hand?
A. Yes, he had some waybills——
Q. Could you tell which hand he was holding on with?
A. Yes, sir; the right hand.
Q. And where were the waybills?
A. With the left.
Q. And as the train moved on what occurred; what was done?
A. Well, we were exchanging bills. I was getting the bills he had for the cars to set out and was trying to hand mine on to him, that he was to pick up there.
Q. And where were you, with reference to the car he was hanging onto?
A. Well, I was possibly within three or four feet of him.
101 Q. Do you remember which hand you had your bills in?
A. No, I don't.
Q. But you were reaching with your hand your bills to Mr. Wolfe?
A. Yes, sir.
Q. And you say you were trying to get the other bills from his hand?
A. Yes, sir.
Q. Which end of the car was he on at that time?
A. South end.
Q. On the south end?
A. Yes, sir.
Q. By "south end" you mean the rear end?
A. Yes, sir.
Q. Mr. Blackwell, look at this picture, Plaintiff's Exhibit "A-2," and indicate—point to which end of the car Mr. Wolfe was on, this end or this end?
A. He was on this end.
Q. What is on the side of that car at that end?
A. A ladder.
Q. Where was he standing or hanging or holding on as the car passed you at the station?
A. Well, he possibly had his foot on this stirrup that comes down here.
Q. And about where was he holding with the right hand?
A. Well, I should judge about there, possibly.
Q. On one of those rungs on the ladder?
A. On one of those grab irons; I don't know which it was.

Q. And where were you standing about that time, with reference to the rear end of that car? Just indicate with a pencil on the picture—the picture was not taken at Bourbon.

A. Well, these are the two main tracks, and I was standing right in between those two main tracks. That represents the two main tracks by the station.

Q. Assume this picture was taken at Villa Grove?

A. Well, it represents the same thing. Here is one main
102 track and here is the other one. This car was moving north and I was standing right in between those two tracks, and that represents the two main tracks, this one and this one.

Q. The car now, as the picture is taken, appears to be on the side-track——

A. Yes, sir.

Q. —or repair track?

A. Yes, sir.

Q. You were standing then near the south end, close to the car, reaching out with those bills?

A. Yes, sir.

Q. Were you within reaching distance of Mr. Wolfe at that time?

A. Yes, sir.

Q. About how fast was that train moving as this was being done?

A. Well, it is pretty hard to judge the speed; I should judge about three or four miles an hour.

Q. Well, with reference to the average gait of a man walking, how fast was it moving?

A. Well, I should judge it was moving a little faster than the average man would walk.

B. Just a little faster than the average man would walk?

A. Yes, sir.

Q. What occurred at that time? Explain to the jury just how this accident occurred?

A. Well, Mr. Wolfe was on over here (indicating), and the way it looked to me like, he had his foot on this stirrup and was holding to this grab iron with his right hand, and his foot slipped or else the handhold or something or other in exchanging those bills to cause him to lose his hold and slip and he lost his balance and fell backwards, right in between these two cars (indicating).

Q. You say he swung around at the rear end and fell
103 between the two cars?

A. Yes, sir; fell backwards.

Q. That is, between the car on which he was riding and the car which was immediately following that, and attached to it?

A. Yes, sir.

Q. And what happened then, Mr. Blackwell?

A. Well, I made a grab to get him, and, of course, him going back under the car, I couldn't reach him.

Q. I believe he was injured at that time?

A. Yes, sir; he was injured at that time.

Q. His left arm was run over?

A. Yes, sir.

Q. What wheel ran over the arm?
A. The two front trucks. The two pair of wheels run over his left arm, of the car that was following the one he fell off of.
Q. The wheel of the front truck of the following car on the west side, ran over his arm?
A. That is the idea.
Q. Do you remember how far the train ran before it was brought to a stop?
A. No, I couldn't say; possibly a car length.
Q. While you were standing there in the act of making this exchange of way bills with Mr. Wolfe, was there any unusual movement of the train at that time?
A. I didn't notice any.
Q. You didn't notice any?
A. No, I didn't notice any.
Q. If there had been a sudden jerk you would have noticed it, being right there, wouldn't you?
A. Depending on how hard the jerk was, enough to make a noise or jerk his his hand out of my way?
Q. You would have noticed it, then?
A. If it had made a sudden jerk, yes; a real hard jerk I would have noticed it.
104 Q. Did you notice any jerk or any unusual movement of the train?
A. I didn't notice any.
Q. And you were right there and close to it?
A. Yes, sir.
Q. Do you recall whether or not before the engine reached the station house, whether the head brakeman came there to ascertain whether there was any way freight?
A. It was customary for them to do that. I don't remember at the time—at this particular time whether he did or not.
Q. But you say that is the custom?
A. Yes, sir; that is customary.
Q. And if there is any way-freight, what is done, what is the custom?
A. Well, we pull the train up in front of the station and unload it or load it.
Q. If there is no way-freight, what is the usual thing done?
A. They pull on down to the station.

Mr. Able: Well, just a minute; I object to that, in view of the defendant's answer, page 2, paragraph 2, that reads as follows: "Further answering, defendant avers that plaintiff had full authority and power, and it was his duty, to bring said train to a stop while transacting official business with the station agent at Bourbon, Illinois, which plaintiff failed and neglected to do, but, instead, plaintiff attempted to make an exchange of waybills with the said station agent while hanging onto and leaning out from the side of one of the cars of the said train while the same was in motion, which said risks and hazards"——

Mr. Reeder: That has been read.

Mr. Able: I wish to object to the attempts to prove anything else as not having been alleged and is in direct conflict to the answer in this case.

105 Mr. Reeder: My question is directed to different conditions. I am asking the witness the custom when there is any way-freight or any business to be transacted at the station.

Mr. Able: I will withdraw my objection, and they can find out what it was.

The Court: He may answer.

Mr. Reeder:

Q. What do they then do?

A. They usually pull on down to the station track and put on or set out whatever there is to be moved.

Q. You say there was a car or cars to be picked up north of the station?

A. There was one car, yes, the way I remember it.

Q. And was there any freight in the train, any cars to be set out at that place?

A. Yes, sir; there was some to be set out.

Q. How far north of the station is this sidetrack where the cars were picked up and set out?

A. The south end of it is about three hundred feet, I should judge, but the switch is still further north.

Cross-examination.

By Mr. Able:

Q. You recollect now, do you, seeing the plaintiff hanging on the south end of this Bessemer & Lake Erie car before the accident, is that right?

A. I don't know whether he was hanging on that car or not. He was hanging on the car, but whether it was that car or not, I don't know.

Q. You did make a statement, or, rather, you told Mr. Noell, that he was on an F. R. L. car, didn't you?

A. No; I said I thought it was an F. R. L. that run over him. That is what I told him.

106 Q. Was there an F. R. L. car in that train at all?

A. I don't know whether there was or not, but the color of the car I should judge it was an F. R. L. car.

Q. What was the color of the car?

A. It was white, the way I remember it, a light color.

The Court:

Q. The one that ran over him?

A. Yes, sir; that is the way I remember it now.

Mr. Able:

Q. The train did move, you say, about a car length or a little over, after this accident—after he fell, didn't it?

A. I should judge it was something like that; I don't remember just exactly.

Q. And Wolfe hung on there for an instant after he lost his hold, didn't he—his balance—his feet came off first and he hung on just a second, didn't he; he hung on there a minute; he didn't im-immediately drop down, did he?

A. Well, by degrees.

Q. And you saw before he fell that he was going to fall, didn't you?

A. Yes, sir.

Q. And you ran some little distance, to catch him, to keep him from falling, didn't you?

A. Not very far; no.

Q. You made a statement about a year ago about how this accident happened, didn't you, to Mr. Noell?

A. Yes.

Q. You didn't tell him at that time that you were actually passing the bills, but you went out to meet Mr. Wolfe to exchange bills with him, when it occurred, didn't you?

A. I don't remember telling him that.

Q. I will ask you if you didn't make this statement; this is your signature here, isn't it?

A. Well, just wait a minute. Didn't Mr. Noell say he wouldn't bring that in court against me?

107 Q. I don't know that?

A. That is what he told me. He only just wanted that for a statement.

Q. Well, do you object to our using it if he made that promise to you?

A. Well, of course, now, it is like this: A lawyer can draw stuff up that I wouldn't know whether it was right or wrong, but as far as I know, it was the truth.

Q. Then you have no objection to it?

A. No.

Q. You are willing to release Mr. Noell from that promise, if he made it to you?

A. Well, I will have to look over the statement (reads statement); why, there is a statement in here that I ran—that I ran—I don't know whether I ran or made a quick step. He has got in here that I ran to catch him.

Q. Did you tell Mr. Noell that?

A. I suppose I did, because he has got it in there.

Q. You don't see anything in that statement you didn't tell Mr. Noell, do you?

Mr. Hocker: Let me see it, please, maybe I will object to it.

The Witness: Nothing, only that he had said he wouldn't use it in court against me.

Mr. Able:

Q. And if you say he made you that promise, we undoubtedly won't if you object to it.

Mr. Reeder: Did you make that promise?

Mr. Able: Well, I don't know whether he did or not. I certainly didn't know of it or I shouldn't have brought it out if there was any such promise made.

Mr. Hocker: There is no objection to using that statement.

Mr. Able: Do you have any objection to it?

Mr. Reeder: Use it; go ahead.

Mr. Able:

Q. I will ask you if you didn't say this to Mr. Noell: "On March 14th, 1918, I was station agent at Bourbon, Illinois, when
108 Lee Wolfe was injured. I left the station office while the train Wolfe was conductor on was moving east from the water tank, where it had stopped. As I got in front of the station with the bills in my hands to give Mr. Wolfe, the conductor, Wolfe fell to the ground of the side of the car; Wolfe also had bills to be given me at the time. The train had been slowly going before it reached the station. As he fell I ran to catch him, but could not catch him before the wheel ran over him." Which wheel did you mean when you said "the wheel"?

A. Did I say "wheel" or "wheels"?

Q. This says "the wheel."

A. There is always two of them.

Q. But if you had reference to the second wheel of this first truck in saying that, and that only one wheel passed over him, you would have used the word "wheel," wouldn't you?

A. I might not have noticed it in that statement at the time.

Q. "But could not catch him before the wheel ran over him. Wolfe has never made a statement to me about how he got hurt and I could not say whether or not he had given any signals to the engineer or fireman before he got up in front of the station. I did not examine the car that Wolfe fell off of." That is signed "S. G. Blackwell, Bourbon, Illinois." That is correct, isn't it?

A. Yes.

Q. And you say you were looking at this—you stated here that you could not say whether or not he gave any stop signal, but, as I understood a while ago, you watched him a car length or more coming towards you?

A. Yes, sir; because I was looking through the ticket window, and there was a bay window out towards the train, and the weather
109 was pretty cold and I never go out of the office until I have to, and I was watching him through the bay window, and after he gave me the signal I left the waiting room to go on to the track to exchange bills with him.

Q. How long before you got anywhere near him did he reach out with his bills?

A. Well, possibly five feet or six feet, or something like that.

Q. Could you have mistaken a list that he was taking the seal numbers on the side of those cars while he was walking along there for bills for you?

A. No, sir.

Q. Are they anything like the same color?

A. You mean a switch list, or what do you mean?

Q. You know that the conductor comes along the side of the train and checks the seals; he has to take each number. There are long numbers and there are some with five or six numbers in each seal, and he has to write those down, and you know that, don't you?

A. What I noticed in his hand was waybills.

Q. Well, now, after he fell there, did you pick up those waybills that he dropped—did he drop them?

A. He dropped part of them.

Q. Did you pick them up?

A. I don't remember if I picked them up, but I suppose I did.

Q. Did you see them on the ground, or were there any waybills there in his own check?

A. I did.

Q. You know that?

A. Yes, sir.

Q. What became of this seal check? He had just been checking seals before this accident happened. Did you see that, too?

A. No, sir.

Q. Didn't see that at all?

A. No.

Q. What kind of a position did he have his hand in when
110 he was holding these out to you?

A. He had it out this way.

Q. That is very much like a stop signal?

A. Sure.

Q. You know a stop sign when you see it, don't you?

A. Yes, sir.

Q. And you might have very easily mistaken the stop sign, then, for something to hand you; is that correct?

A. No, I wouldn't mistake it for that.

Q. Did you bring any record with you of any kind, of these things you were handling there that day?

A. No, I did not.

Q. You do keep a record of every shipment on the order of this book that would show exactly whether or not you had anything to go in that train?

A. Yes, sir.

Q. And you could have brought that along?

A. Yes, sir.

Q. And if you didn't have anything to go in that train you could have conclusively shown that with your book, couldn't you?

A. Possibly, unless it had been bad ordered or something, or other

repair there. They set out these bad order cars, but that wasn't a bad order car that day.

Q. But your book would show every shipment that goes out?

A. My car record would show what cars moved; yes.

Q. And you do keep a duplicate original of every waybill of every shipment originating at Bourbon, Illinois?

A. Yes, sir.

Q. And you keep them for eight years, don't you, so you would have those waybills showing those shipments, wouldn't you?

A. Sure.

Q. If there were any?

A. Yes, sir.

111 Q. And if there weren't any this book would show conclusively that you didn't have any?

A. We could have cars to move on that date and not be a station car. That is, it wasn't originally billed from that station.

Q. But if you didn't have any shipment to go in that car that you opened up—called waycars—you could prove that by this book, couldn't you?

A. State that again.

Q. If you didn't have any small shipment, not a full car, you didn't have any small shipments that were to go in these waycars, you could bring that book here, from a certain date to a certain date, that you could show by the book that you didn't have, couldn't you?

A. Possibly; yes.

Q. You were very much excited there after this accident, weren't you?

A. Yes, sir.

Q. You sent a telegram, didn't you?

A. No, I don't know that I sent a telegram. I told the dispatcher or superintendent, what had happened.

Q. Didn't you send a telegram that Wolfe had both legs cut off?

A. No, sir.

Q. You didn't send that telegram?

A. No.

Q. You did send a telegram?

A. No, I didn't send any at that time; not at that time.

Q. I mean soon after Wolfe left on the train, didn't you wire somebody about it?

A. I possibly made a wire report on it.

Q. Who did you wire to?

A. If I wired, I wired the superintendent.

Q. And you keep a copy of those?

A. Yes, sir.

Q. How far was this car of corn from the station, that you had there?

A. Well, the car of corn was, I should judge, about three hundred feet or four hundred feet from the station.

112 Q. How soon did you see somebody from the claim department of the railroad, after this accident occurred?

A. Well, I believe it was the Sunday following.
Q. Before you saw anybody? That was the Sunday following the accident?
A. Yes, sir; from the claim department; yes.
Q. What time the Sunday following?
A. It was some time after 1 o'clock.

HAY EDWARD SCOTT, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Reader:

Q. State your name, please.
A. Hay Edward Scott.
Q. Where do you live?
A. Villa Grove, Illinois.
Q. What is your business?
A. Locomotive engineer and fireman.
Q. What was your position in March, 1918?
A. I was firing then, on 160 and 161.
Q. What run were you on at that time?
A. No. 160 and 161.
Q. That is the local freight, is it not?
A. Yes, sir.
Q. Between what points?
A. Between Villa Grove, Illinois, and Pana, Illinois.
Q. Where was No. 160 made up that morning?
A. Made up at Pana.
Q. Its destination was Villa Grove?
A. Yes, sir.
113 Q. Who was the conductor in charge of this train that day?
A. Conductor Lee Wolfe.
Q. You were the fireman?
A. Yes, sir.
Q. Do you remember picking up any cars at Arthur?
A. Yes, sir.
Q. What occurred first when you arrived at Bourbon?
A. We stopped and take water.
Q. Where is that with reference to the station?
A. From the station door I should judge it was about one hundred and twenty-five feet south.
Q. The water tank is on your side, on the fireman's side?
A. Yes, sir.
Q. What did you do next after that, after you took water?
A. Well, I got down on the ground and latched the water spout.
Q. All right; what occurred then?
A. Then I got on the engine from the right side.
Q. From the right side? From the engineer's side?

A. Yes, sir.

Q. All right.

A. The train was moving slowly when I got on the engine, and I got over and sat down on the fireman's seat box and caught hold of the bell rope to start the bell ringing, and looked back.

Q. Where was your engine then with reference to the station?

A. Oh, by that time the engine was about—almost opposite the station.

Q. You say you looked back. Then you were on your side, the fireman's side?

A. Yes, sir.

Q. Which side is that?

A. The left side.

Q. The left side, going ahead?

A. Yes, sir.

Q. Was that the west or east side of this train?

A. That is what we termed the west side.

114 Q. The train was moving north, as I understand from the time-table?

A. Yes, sir.

Q. When you first looked back after reaching your position, did you see Mr. Wolfe?

A. Yes, sir.

Q. Where was he?

A. He was running along the side of the train.

Q. How far back from the engine?

A. Well, I should judge he was about five or six car lengths.

Q. And what, if anything, did he do?

A. Give me a highball—proceed—signal.

Q. What kind of a signal is that?

A. Well, a proceed signal is this kind of a signal, what we term a highball signal, which we always move after you raise your hand that way; you also motion your hand that way (indicating).

Q. There are two proceed signals?

A. What we call the highball is not really—it is just the signal that is used among all railroad men when you want to pull on down instead of moving gradually ahead.

Q. And you got a highball at that time?

A. Yes, sir.

Q. You say you saw Mr. Wolfe get on the car?

A. Yes, sir.

Q. On the side of the car?

A. Yes, sir.

Q. He was then on the west side, I believe?

A. Yes, sir.

Q. Did you continue to look back from that time on?

A. Yes, sir.

Q. After taking water, what is the usual way of starting; what signals, if any, are given then?

A. Well, after taking water, we don't always wait for a signal.

Q. Don't wait for a signal?

A. Very seldom do.

115 Q. You knew where the head brakeman was?

A. The head brakeman was on the engine.

Q. He was on the engine?

A. Yes, sir.

Q. Now, did you get any other signals at all after you received he highball given by Mr. Wolfe, from him?

A. No, sir.

Q. What, if anything, did you notice occur with reference to the osition Mr. Wolfe was in, on the car?

A. I noticed he was on the ladder end of the sixth car.

Q. Did you see Mr. Blackwell, the agent?

A. Yes, sir.

Q. Where was he?

A. When I first saw him he was coming out of the station.

Q. What, if anything, did Mr. Blackwell do, that you saw?

A. He was exchanging bills.

Q. With whom?

A. With the conductor.

Q. And where was the conductor at that time?

A. He was on the rear end of the sixth car.

Q. What occurred, that you noticed?

A. Well, he handed the bill out towards the agent, and was holding on with his right hand, and then he let loose with his right hand nd swung back against the car and caught the car with his left hand nd went to exchange some kind of bill, overhanded, to the agent.

Q. What occurred then?

A. His foot slipped and he fell.

Q. Were you looking back all the time?

A. Yes, sir.

Q. When you saw him fall, what did you do?

A. Well, I gave the stop signal.

Q. You gave the engineer the stop signal?

A. Yes, sir.

16 Q. Could you tell where Mr. Wolfe fell, with reference to the following car, the car immediately behind the one on hich he was riding?

A. Well, he dropped to the ground, and kind of staggered back in etween the cars and fell—fell to the ground.

Q. You are sure, then, he fell between the cars?

A. Yes, sir.

Q. The one on which he was riding and the one following that ir?

A. Yes, sir.

Q. As the train was passing and moving on through that station, hile Mr. Wolfe was hanging on to that car, and the agent was there, as there any motion or unusual movement or jerk of that train?

A. No, sir.

Cross-examination.

By Mr. Able:

Q. Mr. Wolfe hung on there a second after he first lost his footing, didn't he?

A. He turned, and turned around; yes, possibly a half a second.

Q. All this changing hands, and so forth, may have been Wolfe attempting to stay on the car, mightn't it?

A. I hardly think so; no, sir.

Q. You are not sure about it, are you?

A. I am positive, yes.

Q. You were watching all this going on all the time?

A. Yes, sir.

Q. How fast was the engine moving?

A. About four or five miles.

Q. The engine could have been stopped in four or five feet going at that rate?

A. I did do it, when I saw it.

Q. It could have been stopped in four or five feet, couldn't it?

A. Possibly.

Q. You know that going at that speed you could stop practically still, couldn't you?

A. No, you can't, not in four or five feet. You couldn't
117 get the motion of that many cars stopped in less than ten or twenty feet, if he was even going about two miles an hour.

Q. But this train did go about a car length after the man fell?

A. About a car length or three-quarters of a car length.

Q. You could see—you were six car lengths away from him, according to your testimony?

A. Yes, sir.

Q. And you were leaning out the side of the engine?

A. Yes, sir.

Q. And you could tell whether he was on the front end of a car or the back end, could you?

A. Yes, sir.

Q. And yet the front end and back end are just a very small distance apart, aren't they, of two different cars?

A. About forty feet, from the front end of a car?

Q. Forty feet from the front end to the back end of the same car, but the front end of the car behind it and the car ahead would only be about four feet?

A. Yes, sir.

Q. And you could tell whether he was holding on to the rear end of the car or whether he was on the front end?

A. Yes, sir; you can tell a ladder from a grab iron. If his body was hanging on a grab iron his body would cut off the grab iron on the rear part of the car.

Q. And you were watching all this to see where he was on there?

A. I have got good eyes.

Q. You knew they found this front grab iron on this car in bad shape down at Tuscola?

A. I was the first man that found it and the man that suggested to look out for it.

Q. And how soon after that did you talk to the claim
118 agent?

A. I never talked to the claim agent until the day before yesterday.

Q. Never had until day before yesterday?

A. No, sir.

Q. Never talked to Mr. Swanson or the other gentleman, over there?

A. No, sir.

Q. How many written statements have you given to the company about this accident?

A. I haven't given any, as I consider, to the company. I made out my interstate report as I understand it.

Q. You mean personal injury report, don't you?

A. Yes, sir.

Q. You made that out?

A. Yes, sir.

Q. And gave that to the company?

A. Mailed it to the company.

Q. And yet you were approached and asked for a statement by Mr. Wolfe in company with Mr. Noell, weren't you?

A. Yes, sir.

Q. On the 9th day of September, 1920?

A. Yes, sir.

Q. And you wouldn't give them any statement of any kind?

A. No, sir; I wouldn't give them no statement.

Q. And you were told that you were the only man on the train that wouldn't give them a statement of what occurred?

A. Yes, sir.

Q. And you were the most important man on the train, because you were down there taking the signals from him?

A. Yes, sir.

Q. And you wouldn't give them a statement?

A. I told them I would tell the truth, as I saw it, and that is the only statement I would make.

Q. You would tell it to them in court, and wouldn't tell it to them there?

A. Certainly.

119 Q. And Mr. Noell told you a lawyer had to investigate a case to know how to file it, didn't he?

A. Yes, sir.

Q. And yet you wouldn't tell him, would you?

A. No, sir.

Q. You haven't any particular interest in this case; you don't care which side wins; you just want whoever is right to win; isn't that it?

A. Yes, sir.

Q. When you went back and found this front grab iron loose, why did you report that and all to the company—did you notice any loose mud on the step underneath that?

A. No, sir.

Q. You didn't notice that?

A. No, sir.

Q. With whom did you go back and look at that?

A. I went back with the head brakeman.

Q. That was Bauman?

A. Yes, sir.

Q. He is not here now?

A. No, sir.

Q. But you do know that the engineer went back, too, don't you?

A. I told the head brakeman that both sides should have the benefit of what was in this case and to go back and inform the engineer not to make out his report until after the car had been inspected.

Q. It was inspected by a man at Tuscola, by another car inspector?

A. I don't know whether it was or not by a regular car inspector.

Q. And when did you decide that it was the rear ladder that the man was on; was it after you had discovered this loose grab iron?

A. When I seen him on the rear end at Bourbon.

Q. It was a Bessemer car that he was on; that was the name of the car?

A. It was what?

Q. The Bessemer and Lake Erie, 80993, the car he was on, was it?

A. Yes, sir.

120 Q. That is the right car?

A. Yes, sir; B. & L. E. 80993.

Q. That is the right car that Mr. Wolfe was on; it wasn't on some other car?

A. It was on the rear end of the sixth car, and that is what the car was.

Q. And that was the sixth car?

A. Yes, sir.

Redirect examination.

By Mr. Reeder:

Q. As the train was passing through the station, was the engineer working steam; was the engine pulling or drifting?

A. He was working the steam.

Q. And when you stopped, was there any slack in the train?

A. I never noticed any slack in it.

Q. I believe you stated that when Mr. Noell, who sits here, came down to see you, you told him the facts?

A. I told him that——

Mr. Able: I object to that as a leading and suggestive question and the witness has testified he would not tell him anything and said he would tell it in court.

Mr. Reeder: The witness said he refused to make a statement, but told him the situation.

Mr. Able: I am positive that he didn't say that.

The Court: Well, what does the witness say about it?

Mr. Reeder:

Q. Did you or did you not tell Mr. Noell?

A. I told him I would tell and did tell him; yes, sir; just about what I have said here, and if he said I didn't, there was a misunderstanding in his cross-questioning with me.

Mr. Reeder: That is the way I understood it; that is all.

121 Mr. Able:

Q. You have been in town for the last two days, all day yesterday and today?

A. Yes, sir.

Q. You weren't in court yesterday, were you?

A. Yes, sir.

Q. Were you?

A. Yes, sir.

EARL C. GREENWOOD, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. What is your name?

A. Earl C. Greenwood.

Q. Where do you live?

A. I live in St. Louis, 1433 Chestnut street.

Q. What is your business?

A. Engineer.

Q. By whom are you employed?

A. C. & E. I.

Q. Were you an engineer working for the C. & E. I. Railroad Company—the Director General, rather—March 14th, 1918?

A. Yes, sir.

Q. What train were you in charge of?

A. One hundred sixty and 161.

Q. I believe that is the local freight between Pana and Villa Grove?

A. Yes, sir.

Q. You heard Mr. Scott testify?

A. Yes, sir.

Q. Was he your fireman that day?

A. Yes, sir.

Q. You know Mr. Wolfe, I believe?

A. Yes, sir.
Q. He was you conductor?
A. Yes, sir.
Q. Mr. Greenwood, did you witness or see this accident?
A. No, sir.
Q. You were then on the right side or east side of this train?
A. Yes, sir.
Q. In your engine?
A. Yes, sir.
122 Q. Where was the fireman?
A. As we were passing through Bourbon he was on the seat box.
Q. He was on what?
A. On the seat box, on his side.
Q. And which side of the engine was that?
A. The left side.
Q. With reference to being west or east, which side?
A. The west.
Q. Do you know what he was doing as you were passing along there?
A. Yes, sir.
Q. What was he doing?
A. He was taking the signals.
Q. You mean he was looking back?
A. Yes, sir.
Q. Did you get a distress signal from him?
A. Yes, sir.
Q. And what did you do—how did you act on that signal?
A. Well, I applied the emergency brake and stopped.
Q. As your train was moving along just before you got the distress signal were you working steam?
A. Yes, sir.
Q. How far did your engine run after you applied the brakes?
A. Well, about fifteen or twenty feet.
Q. Previous to the application of the brakes was there any sudden or unusual jar or jerk or movement of the train, just previous to that?
A. None that I knew of.
Q. Was there any change whatever in the movement of the train just immediately before that?
A. Yes, sir; there was a change in the movement.
Q. In what way?
A. Well, after I took water the brakeman got on the engine and told me he had a piece of freight to unload, and I drifted
123 along down and shut the engine off to spot this way-car to unload the freight, and about the time I got to where the car should be spotted they gave the signal to go ahead.

Mr. Able: I object to that.

Mr. Able:

Q. You didn't see anybody give him a signal to go ahead?
A. He gave me the signal.
Q. But you didn't see anybody give it to him?
A. No, no.

Mr. Reeder:

Q. You got the go ahead signal from the fireman?
A. Yes, sir.
Q. What did you do then?
A. I went ahead.
Q. And how far did you move before you got the distress signal?
A. About two or three car lengths.
Q. Was there any change in the movement of the train from the time you got the go ahead signal until you got the distress signal?
A. No.
Q. I believe you said there was no sudden or unusual movement of the train?
A. Not that I know of.

Cross-examination.

By Mr. Able:

Q. If there was a jerk it wouldn't occur at the engine, would it, ever?
A. You can generally feel it; you can feel it in the seat box.
Q. But the jerk doesn't occur in the engine; it is the whipping motion that causes the jerk?
A. The slack in the cars.
Q. And the engine, pulling that, you just feel it the faintest?
A. You can feel it jerking, like a thumping of your head, that way.
Q. Which would be very faint?
A. Yes, sir, but you can feel it.
124 Q. You say you don't know where the fireman Scott got the signal he repeated to you?
A. No, sir.
Q. And that would be about the sixth or seventh, about opposite the front of the station, wouldn't it?
A. Further back than that—we generally haul from one to five waycars—the engineer don't know that.
Q. But about the time you were expecting to get a stop signal you got the go-ahead signal?
A. Yes, sir.
Q. And you got that from the fireman?
A. Yes, sir.
Q. And it was very shortly after you got that signal from the fireman that you noticed a peculiar look on the fireman's face?
A. About two or three car lengths; yes.

Q. You can't be mistaken about how far you went?
A. I can judge a car's length pretty good.
Q. I understood you to say on direct examination that you got a distress signal from the fireman, but the fact is, isn't it, that you noticed the way he was looking and stopped the train?
A. Well, I was stopping it when I got a signal from him, because I saw there was something wrong on that side.
Q. You could tell by the way he was acting?
A. Yes, sir.
Q. So the real stop was made not on his stop signal but on what you saw was going on there?
A. Well, under the impulse of the moment, a man has got to act "right now."
Q. And the way he was looking you saw something must have happened?
A. Yes, sir; and with the signal, too.
Q. And after you had started to stop he gave you the signal; is that right?
A. Yes, sir.
Q. Could you be mistaken about the distance that you went after getting the go-ahead signal or the proceed signal from
125 the fireman, and when you saw this look on his face—I ask you if you didn't—you wrote out this, I believe, in your own handwriting, this statement for the use of the plaintiff, didn't you, in this case?
A. Yes, sir.
Q. And after——
A. Not exactly for the use of the plaintiff, but just as the case was.
Q. I mean you knew it was the plaintiff's lawyer that was talking to you?
A. Yes, sir.
Q. And he asked you to sit down and write it out?
A. Yes, sir.
Q. And you did that?
A. Yes, sir; just exactly.
Q. And it is written in your own handwriting, is it?
A. Yes, sir.
Q. And after you had—you signed it in one place on the first page and you added something to it and signed it again on the second page?
A. They asked me about the occurrence and I told him—I don't remember just what it was.
Q. I just wanted you to identify your signature and the handwriting.
A. That is the same as I just told you.
Q. All of this is in your own handwriting, is it?
A. Yes, sir.

Mr. Able: I would like to have this marked by the stenographer as "Plaintiff's Exhibit D."

(Said pape was marked by the stenographer "Plaintiff's Exhibit D.")

Mr. Able:

Q. This is what you wrote out, is it?
A. Yes, sir.
Q. I will just read it to you: "My name is Clyde Greenwood, and I was engineer on train 160, northbound. I stopped at Bourbon for water, and got signal from fireman to proceed and,
126 after pulling about eight or ten car lengths, fireman became excited, and I stopped to ascertain what was wrong, and he said conductor fell under the train. On arrival at Tuscola I got instructions from superintendent to take charge of the train and inspect the car, which I did, finding grab iron on front of car very loose and car was bad ordered on my arrival at Villa Grove," and then after you signed that you added this: "After leaving water tank and as we were pulling by station very slowly the fireman gave me signal to pull on down to the team track and I acted upon the fireman's signal and about the time I took the signal to go ahead I noticed the expression on the fireman's face and I stopped. I was expecting to get stop signal to spot the waycars or get a proceed signal after we left the water tank. Box 203, Findlay, Ill. E. C. Greenwood." That is correct, is it?
A. Yes, sir.
Q. And that is what occurred there, it is?
A. Yes, sir.

Mr. Able: I now desire to offer this in evidence, Plaintiff's Exhibit "D."

(Said paper is in words and figures as follows: Omitted by consent.)

Mr. Able:

Q. Describe this grab iron that you went back and examined?
A. Well, it was on the west side of the car on the north end and it was wore in the wood and, of course, the nuts were up tight as far as threads would go, and the handle just worked up and down, about an inch.
Q. The handle would work up and down about an inch?
A. Yes, sir.
Q. Did you notice any rotted and worn part in the hole
127 that the bolt went through into the wood?
A. It was worn a little at the wood.
Q. And it was decayed there where it had worked up and down?
A. No, it didn't look like decay.
Q. You did look at this car, yourself?
A. Yes, sir.
Q. You wouldn't pass that car up as a proper car to be used, though, you bad ordered it?

Mr. Hocker: I object to that.
The Court: Objection sustained.

Q. Did you have a car inspector look at the car then?
A. No, sir.
Q. Did any one look at that car at Tuscola?
A. Not that I know of.
Q. Now, did you notice anything on the sill step underneath that grab iron to indicate where Wolfe or anybody had been on there—it had rained just a little bit before you got to Bourbon—a slight rain?
A. Yes, sir.
Q. And you men went back there to find the place and you found mud—new fresh mud on that still step, didn't you?
A. I couldn't say whether it was new or fresh or not, but there was mud on the step.
Q. And that was the only rain that you had at all—it wasn't wet, muddy weather, was it?
A. It drizzled rain all the way up, about the time we arrived at Bourbon.
Q. And you examined all the cars along there and you didn't find mud on any other still steps along there, did you?
A. Yes, I found some on the others, too.
Q. You found some on the others?
A. Yes, sir.
Q. Did you find any mud on the south end or ladder end of this same car?
A. I believe I did.
128 Q. You believe you found it there?
A. I am not real positive about it, but I think there was mud on three of the steps of this car, because I took particular notice of the car on account of being instructed to examine it for defects.
Q. Did you put that on your report to the company, your written report to the railroad, that you found that mud on all three steps?
A. I don't remember whether I did or not.
Q. Did you put that you found mud on one step?
A. I made it just as short and brief as I could.
Q. You men that went back there——
A. We weren't looking for mud. We were looking for defects in the car.
Q. Who went back with you?
A. I went by myself.

Redirect examination.

By Mr. Reeder:

Q. Of course, you don't know whether anybody was on that step when this car was picked up at Arthur, do you?
A. No, I don't know.
Q. Or how many brakemen or others had been on that step, or whether Mr. Wolfe had been on it thereafter?
A. No, sir.

Q. Look at this picture, Plaintiff's Exhibit "A-2," and just see if that is a picture of that car?
A. That looks like the car.
Q. You stated that you found some play in the bolts?
A. Yes, sir.
Q. That held this grab iron?
A. Yes, sir; the other part of the car was all right, in good shape.
Q. You know how that grab iron is fastened on to the car?
A. Yes, sir.
129 Q. How?
A. Bolted through with about three-eighths bolts on the inside.
Q. The bolt is put in from the inside?
A. Yes, sir; the bolt inside and the nut outside, so you can tell whether it is loose or not.
Q. Through what does the bolt go?
A. It goes through the wood of the car.
Q. And what else on the outside?
A. The grab iron.
Q. Through the end of the grab iron?
A. Yes, sir.
Q. What is put on the end of the bolt?
A. Nuts to hold it.
Q. You may state whether or not that grab iron was screwed up tight to the side of the car.
A. It was screwed up as far as the thread would go.
Q. As far as the thread would go?
A. Yes, sir; to the bolt.
Q. What do you mean by "play" in the grab iron; explain to the jury what you mean by that?
A. Lost motion or slack.
Q. You mean that the hole through the wood was a little larger at the outside than the bolt; is that what you mean?
A. Yes, sir.
Q. And the movement was up and down?
A. Yes, sir.
Q. Horizontally?
A. Yes, sir.
Q. And about how much of play was it, with reference to an inch or half inch, and so forth?
A. Well, a little over half an inch, and probably an inch.
Q. And that was horizontally, up and down?
A. Yes, sir.
Q. This grab iron didn't pull off, did it?
A. No, not at all.
130 Q. You don't mean there was an inch movement in the wood?
A. Not in the wood.
Q. The outer side of the grab iron would move up——
A. Yes, sir; about that far from the side.
Q. How far are you indicating now?
A. About three and a half or four inches.

Q. The grab iron is about three and a half or four inches outside the car?

A. Yes, sir.

Q. And the grab iron would move up and down about an inch?

A. Yes, sir.

Q. Was that the only thing that you found wrong with that grab iron?

A. The only thing I found.

Q. I believe you also examined the ladder on the south side?

A. Yes, sir.

Q. What was the condition of that?

A. Good.

Recross-examination.

By Mr. Able:

Q. Was there any dents or damage along the handhold, bent in anywhere?

A. No, sir.

Q. Looked as though it had hit anything and been broken?

A. No, sir.

Q. Just a place that had been worn and permitted the handle to go up and down, is that it?

A. Yes, sir.

Q. Did you find anything else wrong with that car?

A. Not a thing.

Q. Nowhere?

A. No, sir.

Q. What did you do with the car?

A. I took the car on to Tuscola and on through to Villa Grove.

Q. What did you do when it reached Villa Grove?

A. Took it into the yard and got it off to the yard and inspected it there.

Q. Did you take it to the repair shop?

A. No, switching yard.

131 Q. What do you mean in your statement that you "bad ordered" the car?

A. They bad ordered it at Villa Grove.

Q. By "bad ordered," what do you mean?

A. Well, that means examined it for defects, and put them off over on a track by themselves and examined it.

Q. Do you mean by that they put it in the bad order repair shop and repaired it there?

A. No, sir; I got it over to the engine house.

Q. When you say you bad ordered a car, you don't mean you put it on the repair track?

A. No, a man puts a tag on it, and then they know not to move the car until they are given orders to move it, the same as a flag; you can't go on with a flag on a track until the man who puts it there says so.

Q. How far does the cab stick out—further than the other cars of the train?

A. About the same distance; some about an inch wider.

Q. And a man with his head out the window of the cab would see right on a line down the side of the train?

A. Yes, sir.

Q. And to see a man down six car lengths it would be very hard to determine whether he was on the front end of one car or on the rear end of another?

A. I don't know about that; I never tried it.

Q. You have been railroading a good length of time?

A. Yes, sir.

Q. And six cars away you can't tell where a man is, on the front or rear end?

A. Yes, sir; you can't at night, but you can in the daytime.

132 Redirect examination.

By Mr. Reeder:

Q. Mr. Greenwood, looking at this picture again I will ask you to state whether or not there is a brake at one end of the car?

A. Yes, sir.

Q. And is that where that arrow indicates?

A. Yes, sir; that is the hand brake.

Q. Looking back six cars from the engine could you tell whether the man was on the "B" end of the car, as you call it, or the other end?

A. No, not unless he was back ten or twelve cars. You could tell whether he was on the brake end or middle of the car.

Q. Could you tell whether he was on the ladder or not?

A. Yes; you could tell he was on the ladder.

At this point the Court, after instructing the jury as to their actions while absent from the courtroom, announced recess until 2 p. m., at which time the following proceedings were had, to wit:

CHARLES COMPTON, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. What is your name?

A. Charles Compton.

Q. Where do you live?

A. Bourbon, Illinois.

Q. What is your business?

A. Foreman—track foreman of the C. & E. I.

Q. What was your position on March 14th, 1918?

A. The same.

Q. Where were you when local No. 160 pulled through Bourbon that day?

A. At the car house.

133 Q. Where is this car house with reference to the station?

A. Well, it is about between three or four hundred feet away.

Q. Did you see Mr. Wolfe?

A. Yes, sir.

Q. Did you see the accident?

A. Just partially.

Q. Do you know Mr. Blackwell, the agent?

A. Yes, sir.

Q. Did you see him about the time of the accident?

A. Yes, sir.

Q. Where was Mr. Blackwell?

A. He was standing between the tracks.

Q. Standing between the tracks?

A. Yes, sir.

Q. What track was the train on?

A. On the northbound.

Q. Well, now, was there a track between the northbound track and the station?

A. Yes, sir; double track—southbound.

Q. Did you see Mr. Blackwell between the north and the southbound track?

A. Yes, sir.

Q. Where, with reference to the station?

A. Well, just in front of the station.

Q. North or south of the station—you say in front of the station

A. Right in front, about opposite the waiting-room door, it looked to me like.

Q. What was Mr. Wolfe doing as the train passed by going north

A. You mean when I saw Mr. Wolfe at first.

Q. When you first saw Mr. Wolfe, where was he?

A. Well, he was passing along his train at the west side, checking I suppose; he had a book and a pencil.

Q. He was then on the ground?

A. Yes, sir.

Q. You say he was checking up; what do you mean by that?

A. He was around taking the car numbers or seal numbers

134 Q. And he had the usual book that is used by conductors is that right?

A. Yes, sir.

Q. What kind of a book was that?

A. Well, it was a book about two and a half inches by six or seven and about half an inch thick.

Q. That is the usual book used by conductors——

A. Yes, sir.

Q. —For that purpose?

A. Yes, sir.

Q. Did you see Mr. Wolfe get on the car?

A. No, sir.

Q. Did you see him after he was on the car?
A. Well, the next time I saw Mr. Wolfe, he was falling.
Q. Falling?
A. Yes.
Q. And what was going on there at that time; what was being done?
A. Well, I couldn't say to that.
Q. Well, where was the agent with reference to Mr. Wolfe?
A. He was standing real close to where Mr. Wolfe was falling.
Q. What, if anything, did you notice in Mr. Wolfe's hand, or about his hands?
A. I never noticed anything.
Q. You say you were then about three hundred feet away?
A. Yes sir.
Q. Just tell us as near as you can how Mr. Wolfe fell?
A. Well, it looked to me like he was falling between two cars.
Q. Between two cars?
A. Yes, sir.
Q. Had he fallen or was he in the act of falling when you first noticed him?
A. Well, he was falling. He was going out of my presence at the time—out of my sight.
135 Q. You say he fell between two cars?
A. That is the way it looked to me.
Q. Just before he fell did you see him on the car or any part of it?
A. No, sir.
Q. Where did he fall with reference to where the agent was standing?
A. Well, it looked to me like they were both about the same place.
Q. Could you tell what end of the car he was on?
A. Well, he was, as I saw him, he was turning around to the south and went in between the cars. He must have been on the head car or the one following.
Q. He was backed around in between the two cars?
A. Yes, sir; that is the way it looked to me.

Cross-examination.

By Mr. Able:

Q. When did you first know that you were going to be a witness in this case?
A. I believe it was Saturday.
Q. Did you ever make out any personal injury report to the company, as to what you saw?
A. Yes, sir.
Q. When did you make that out?
A. I made that out that night.
Q. Have you seen that recently?
A. I saw it this morning.
Q. Is that in court, where you can refresh your memory by it?
A. No; I had my memory made.

Q. Is that here so you could refresh your memory by it?
A. Is it here?
Q. Yes.
A. I can't say as to that.
Q. Did you ever tell anybody in Bourbon, Illinois, that you ever saw any part of the accident?
A. Not that I remember of.
136 Q. Bourbon is a small town?
A. Yes, sir.
Q. And nearly everybody around there knows about the accident?
A. Yes, sir.
Q. And knows the car and what the car had in it; it had corn in it, and all that?
A. I don't know.
Q. I mean everybody in the town of Bourbon knew all about it and all the witnesses, and all about it?
A. Not that I know of.
Q. You never told anybody you saw any part of it?
A. It was talked around.
Q. Name some person outside of the claim department that you told that you saw this accident?
A. I couldn't call any names.
Q. You say you were three or four hundred feet away from this man; is that correct?
A. Yes, sir; between three and four hundred feet.
Q. And how far away were you from this track?
A. Well, the right of way there is fifty feet on the west side, and I was probably twenty-five feet.
Q. You were standing about twenty-five feet away from the track?
A. Yes, sir.
Q. And you could stand off three or four hundred feet down the track and twenty-five feet away from the track, and tell whether a man was on the head end of a car or on the rear end of a car; is that correct?
A. I could tell the way he was swinging, the way he was falling; that is what I could tell.
Q. You mean you could tell whether he was falling north or south?
A. Why, yes; he was falling south.
Q. He was falling south, was he?
A. Yes, sir; falling south, right in between two cars.
Q. And you could tell it was in between two cars, three
137 or four hundred feet down there, and as close as twenty-five feet to the track?
A. Yes, sir.
Q. You were even farther south than the water pump down there, weren't you?
A. I was about sixty feet away from it.
Q. Farther south?
A. Yes, sir.
Q. And the water pump was on the same side of the track that you were on, wasn't it?

A. The water pump?
Q. The water tank, where they fill the engine with water?
A. Yes, sir.
Q. And directly in line of your vision, wasn't it?
A. No.
Q. How did you happen to be standing there all this time from the time Mr. Wolfe was walking down on the ground checking the seals, down when they were filling the water and putting water in the engine, all the way up to where the accident occurred?
A. I wasn't.
Q. You saw him along there taking seals?
A. Yes, sir; the train was stopped then, taking water.
Q. You could even describe the books he had in his hand; that is what you call the ordinary seal record book?
A. He wasn't that far away.
Q. How many feet away were you?
A. Well, when Mr. Wolfe was taking the seal records, I was probably fifty feet away from him.
Q. Fifty feet?
A. I suppose so.
Q. You are sure you saw the book, are you?
A. Yes, sir.
Q. And you knew the book and you knew it to be the seal record book because the men keep those?
A. Yes, sir.
138 Q. And you didn't happen to know, however, for seven years that Mr. Wolfe never did at any time use a seal record book, but took them on paper, like the one we have here in court?
A. I never saw any here in court.
Q. You don't happen to know that if you worked on Mr. Wolfe's trains, any of them, that you won't find any seal record books that he kept?
A. I don't know.
Q. But the others who worked with Mr. Wolfe would be able to testify as to whether he kept a seal record book or not, wouldn't they?
A. Yes, sir; I suppose so.
Q. And they would be able to testify whether he simply used an ordinary slip and then entered them up on a record—duplicate record, like this, showing the seals?
A. Yes, I suppose so.
Q. You don't know that this is the only record of any kind that Mr. Wolfe kept showing the seals in his car?
A. I don't know what Mr. Wolfe had besides the book.
Q. Who did you first talk to about seeing this seal book in his hand?
A. I don't know whether I spoke to anybody about it or not.
Q. You never told Mr. Reeder here at all, and he didn't even know he had a book in his hand?
A. I believe I told him last night, but I wouldn't say for sure I did.

Q. It wouldn't have been this morning, after some discussion, what was said about him having it in his hand?
A. No, sir.
Q. You heard that this morning, didn't you?
A. Yes, sir.
139 Q. Did you talk to Mr. Reeder this morning?
A. No, sir.
Q. Did you see him at lunch time?
A. No, sir.

E. J. POWELL, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing bu the truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. What is your name?
A. E. J. Powell.
Q. Where do you live?
A. Bourbon, Illinois.
Q. What is your business?
A. Track laborer.
Q. What was your business on March 14th, 1918?
A. Working on the track for the Chicago & Eastern Illinois Railroad Company.
Q. For whom did you work at that time; who was your section foreman?
A. Charlie Compton.
Q. The gentleman who just testified?
A. Yes, sir.
Q. Did you see this train No. 160, freight, local freight, northbound, that day as it passed through?
A. The local; I don't know what number it was.
Q. Do you know Mr. Wolfe, the conductor?
A. No, sir; I am not acquainted with him. I never made his acquaintance. I know him just when I saw him and knew who they say he is.
Q. Did you know who he was at that time?
A. I can't say that I do.
Q. Did you see this accident?
A. No, sir.
Q. Did you see Mr. Wolfe fall?
A. No, sir.
Q. Where were you when the accident occurred?
A. At the car house.
Q. That was south of the station?
A. Yes, sir.
140 Q. Had you seen the conductor of that train before the accident occurred?

A. No, sir; I don't think I did. I saw him on the train.
Q. You saw him on the train?
A. Yes, sir.
Q. Then you saw him, then?
A. Yes, sir.
Q. What part of the train was he on?
A. On the south end of the car when I saw him.
Q. What kind of a car was it?
A. Well, it was a box car, but I don't remember what——
Q. The south end, was that the ladder end of the car?
A. Yes, sir; they were headed north, and he was on the rear end from the north.
Q. The rear end to the north?
A. Yes, sir.
Q. Was the train moving at that time?
A. Yes, sir; it was when I saw him, but I never saw him more than about twenty-five or thirty feet. I just saw him then as we were working at the car house and grinding up tools and things like that. I just happened to see him.
Q. What was he on at that time?
A. What do you mean?
Q. Well, you said he was on the south end of this car, what was he holding on to?
A. To those braces they have there to hold to.
Q. Is that the ladder end?

Mr. Able: I object to the leading and suggestive questions.

Mr. Reeder:

Q. Look at this picture; this is a picture of this car, Plaintiff's Exhibit "A-2," of the car as taken—this is north and this is the south end?
A. Is this the north end, did you say, here?
Q. Yes.
A. He was here when I saw him.
Q. And what was he holding to?
A. To one of those hand businesses, and had one hand out.
141 Q. You are referring now to the ladder on the side of the car, at the south end?
A. Yes, sir.
Q. Where was he, then, with reference to this station house?
A. He was south of it, I suppose, two hundred feet, two hundred and fifty, or something. I don't know just the distance? A short distance, though.
Q. You didn't see him when he fell?
A. No, sir; I never saw him when he fell.

Cross-examination.

By Mr. Able:

Q. You have seen a lot of men hanging on the side of box cars, haven't you?

A. Yes, sir.

Q. And you work along there—how many years have you been doing section work?

A. Well, I have been working off and on. I have been in the service; it soon will be three years in succession.

Q. And how long, all told, have you been in the railroad business?

A. Well, I commenced this last time January 13th, 1918.

Q. I just want to know when you first started in the railroad business; about what year and how long ago?

A. Why, in 1906, I think is the first time I worked in a section. I worked about three or four months then, and then I didn't work any more until 1912.

Q. Was there anything peculiar about the man being on the side of the car, that way?

A. Was there anything peculiar?

Q. Anything unusual about it?

A. No, I don't know as there was. I have seen lots of them riding on the sides of cars.

Q. You didn't see the accident at all?

A. No, sir.

142 Q. You knew afterwards that there had been an accident—pretty soon—didn't you?

A. Yes, sir.

Q. About how long was it in between the time you first saw him hanging there before the accident happened?

A. Well, it wasn't—it was just a very few minutes.

Q. And what impressed it upon your mind that the man was on the back end instead of the front end of the car; was there anything that——

A. No, sir.

Q. Can you tell us, now, even of a week ago, where some man was hanging on the side of some car that passed you, whether he was on the front or on the back end?

A. No, I don't know as I could. I think they passed first on one side or the other, just as it comes handy.

Q. Can you pick out some man you saw passing you a week ago and tell us which end of the car he was hanging on?

A. No, I don't know as I can.

Q. Well, what was there particularly about this that impressed you as to which end of this car Wolfe was hanging on?

A. I just saw him there. That is all the particulars there is to it.

Q. You just saw him there?

A. Yes, sir.

Q. You didn't see the accident?

A. No, sir; I didn't see the accident.
Q. And how far were you from the pump house or the water house—where they fill the engines with water?
A. The car house, I suppose, is ninety—I suppose it is two rail lengths, or something like that. It may be further than that; I don't know.
Q. Which direction?
A. South of the pump.
Q. Those rails are about thirty-six feet long?
A. Thirty-three, I think they are.
143 Q. And you were approximately sixty-six feet further away from the station agent's—from the regular station than the pump house, were you?
A. You say how far from the depot I was?
Q. You said at first, as I understood you, that you were two rail lengths?
A. When I first saw Mr. Wolfe it was about two rail lengths; that would make it about sixty-six feet, I guess.
Q. South of the pump?
A. Yes, sir—it is about that far from the pump to the house. I think it might have been three car lengths. I don't know just the distance, exactly. It isn't very far, though; just a few steps.
Q. Where were you standing, you say, at the time you saw Mr. Wolfe?
A. In the car-house door.
Q. The car-house door is how far south of the water spout?
A. Well, that is just what I was saying. I think it might be about ninety feet, or maybe one hundred feet.
Q. One hundred feet down to the car-house—I mean down to where you were?
A. Yes, sir.
Q. From this water spout?
A. Yes, sir.
Q. And how far is it from the water spout to the station, the regular station?
A. I think it is about half way, as well as I can remember or figure it out now.
Q. You think it is just about another one hundred feet?
A. I think it is, sir.
Q. And how far were you from the track?
A. Well, I guess it is about twenty or twenty-five feet.
Q. When you saw Wolfe hanging on this—you say the south end—the back end—of this car, where was Wolfe there along the car?
A. Wolfe and the car was along about even with the water
144 spout when I saw him.
Q. About even with the water spout?
A. Yes, sir.
Q. That would be one hundred feet away?
A. Yes, sir; about one hundred feet.

Q. And that is when you noticed he was on the back end?
A. Yes, sir; then I didn't watch him any further, just saw him on there; just looked at him and seen him.
Q. Did you go up there after he fell, up to the station?
A. Yes, sir; we went up there after he fell under the car.

JOHN L. BAUMAN, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. What is your name?
A. John L. Bauman.
Q. Where do you live?
A. Detroit, Michigan.
Q. What is your present business, at the present time?
A. Automobile business.
Q. Were you a member of this train crew, local freight No. 160 on the 14th of March, 1918?
A. Yes, sir.
Q. Was Mr. Wolfe your conductor at that time?
A. Yes, sir.
Q. What part of the train were you on?
A. I was on the caboose.
Q. The rear brakeman?
A. Yes, sir; the rear end of the caboose.
Q. As the train approached the station of Bourbon, wher
145 were you?
A. When we approached there?
Q. Yes, and took water?
A. Well, I was possibly in the caboose when we stopped there. was on the ground while we were taking water.
Q. You were on the ground while the water was being taken?
A. Yes, sir; at the rear end.
Q. When the train moved after the engine had taken water, wh did you do?
A. I got on the rear steps of the caboose, and riding there.
Q. Hanging on the rear steps of the caboose?
A. Yes, sir.
Q. What position were you in when Mr. Wolfe was hurt?
A. Well, I was just looking around the back end of the caboo
Q. You were on the rear end of the caboose and were looking o you say?
A. Looking north; yes, sir; towards where the train was going.
Q. Did you see this accident?
A. Yes. I saw him fall.
Q. Now, describe to the jury just how he fell?
A. Well, as near as I could tell the way he fell, he fell backwar

That is, he was swinging backwards when I saw him and, apparently, he went between the cars.

Q. Between the cars. You say at that time you were looking north?

A. Yes, sir.

Q. What side of the train was that?

A. On the west side.

Q. How far was the caboose back from where Mr. Wolfe was, how many car lengths?

A. Well, I believe possibly five or six.

Q. I believe the testimony shows you had eleven cars in
146 the train that day?

A. Ishould judge about the middle of the train.

Q. Did you see anyone else there where Mr. Wolfe was?

A. Well, the agent was coming there.

Q. Could you tell what was being done from the position you were in, if anything?

A. Well, exchanging waybills.

Q. Exchanging waybills?

A. That is what they were doing.

Q. Now, describe again, so that the jury might thoroughly understand, just how Mr. Wolfe was standing or hanging on to that car, and how he fell?

A. Well, he was riding on the ladder of the car, as near as I could tell, from the way he was—from the height he had his hand up there.

Q. From the height he had his hand.

A. And apparently—naturally—he was on the rear end of the car—apparently from my view he was on the rear end of the car. That would be the ladder end of the car. From the position he was standing in when falling, he swung backwards and in between the cars in kind if a turning position.

Q. He fell backwards between the cars?

A. Yes, sir.

Q. Do you mean by that between the car on which he was riding and the car that was following that car?

A. Yes, sir; the car that was following.

Q. When he was falling, where was the agent?

A. Just about even with him, I presume.

Q. Just about even with him?

A. Yes, sir; as far as I could tell.

Q. Look at this picture; it is Plaintiff's Exhibit "A-2," and
147 substituted for Plaintiff's Exhibit "A," representing a picture of that car; now, what end—this represents the north end by this arrow and the south by the arrow; that is what I am pointing to now?

A. Yes, sir.

Q. Which end was it that you say that Mr. Wolfe was on; indicate, please, by pointing to the end?

A. In the position he was standing in there, would be this end (indicating).

Q. This end (indicating)?
A. Yes, sir.
Q. And you say you are sure of that, because of the height?
A. He had his hand hanging on the side of the car.
Q. Observing the north end of the car, I will ask you about how high the grab iron on the north end is?
A. From the inside sill, I should judge about eighteen inches.
Q. Is that the only handhold or grab iron on the north side of the car?
A. Yes, sir.
Q. I mean on the north side there—on the side of the car at the north end?
A. Yes.
Q. If this car is in that position now, this being north and south, he was hanging on to the ladder end, swinging around?
A. Yes, sir.
Q. And fell between the two cars?
A. Yes, sir.
Q. Was there any rough or unusual movement of the train at that time or immediately before that time, the time he fell?
A. I didn't notice any.

Cross-examination.

By Mr. Able:

Q. You live in Detroit?
A. Yes, sir.
Q. When were you asked to come here?
A. Sunday—this last Sunday.
148 Q. You came here voluntarily, of course; they couldn't subpœna you and make you come; you came here, did you?
A. Yes, sir.
Q. Was your railroad fare and all advanced you so you could come here?
A. No, sir.
Q. You put up your on money to come?
A. I paid my own fare down here; yes.
Q. And you never have been approached by anybody representing the plaintiff to find out what you knew about this, have you?
A. No.
Q. You made a statement to Mr. Hammer, who was in the caboose and to Mr. Fisher, the day this accident occurred, that you were inside of the caboose and didn't see any of it, did you?
A. No, sir.
Q. You didn't make that statement?
A. No, sir.
Q. And you weren't in the caboose?
A. No, sir.
Q. But you were out on the outside and saw it?
A. I was on the back platform.

Q. What work did you have that would put you out there, hanging around the side of the caboose, looking up the train?
A. I wouldn't necessarily be hanging there.
Q. You couldn't see from the rear platform of the caboose of that train, up ahead, could you?
A. I could, as the platform on the caboose stands out flush with the side of the caboose.
Q. But you would have to put your head around the side to see?
A. I would; yes, sir.
Q. And you will say that you didn't make a statement in the presence of both Mr. Fisher and Mr. Hammer, riding down on the caboose with you, riding down on the caboose with this man, that you were inside of the caboose and didn't see any of it?
A. I never—I don't think I did.
149 Q. You made out a personal injury report to the company, didn't you?
A. Yes, sir.
Q. And in that personal injury report you very likely indicated where you were, didn't you?
A. I did.
Q. Have you seen that report?
A. Not since I came back.
Q. But if that report was brought forward, it would show where you were, wouldn't it?
A. It would.

Mr. Reeder: If you would like to see this report, we have it.
Mr. Able: I would be delighted.

Mr. Able:

Q. I will ask you to look at this personal injury report which I will ask be marked as "Plaintiff's Exhibit E"; will you say that that handwriting with the indelible pencil was put on that paper more than two years ago.

(Said paper was marked by the stenographer as "Plaintiff's Exhibit E.")

The Witness: Yes, sir.

Mr. Able:

Q. You put that on there more than two years ago?
A. I did.

Mr. Able: I would like to introduce that in evidence at this time.

(Said Plaintiff's Exhibit "E" is as follows: Omitted by consent.)

The Witness: If it has been that long ago. Has it been that long ago since that accident occurred, over two years?

Mr. Able:

Q. There seems to be some objection to my putting it in at this time, that I would have to save it and put it in after the witness' testimony.

Mr. Hocker: If you are reading it to the jury, and then exhibiting it to them?

Mr. Able: I am merely exhibiting it to them for the looks of the handwriting.

Mr. Hocker: If it is to go in, it has to go in for every purpose.

Mr. Able: I am willing to let it go in for every purpose that is stated on it. Have you any objection to my letting it go in now?

Mr. Reeder: If you wish to do so, you may.

The Witness: It has been over two years ago?

Mr. Reeder: It was March 14th, 1918.

The Witness: Yes, sir; it is all right.

Mr. Able:

Q. I will ask you if you didn't tell Mr. Fisher in this courtroom this morning that all you could testify to about it and all you were here for was to say there wasn't any jerking at the rear end of that train?

A. No, sir.

Q. You didn't make that statement to Mr. Fisher, in court?

A. No, sir.

Q. Did you tell any of the men that were in that crew or your brother, C. F. Bauman, that you saw any part of the accident?

A. Yes, sir.

Q. You have a brother named C. F. Bauman that lives in Illinois?

A. Yes, sir.

Q. And he knew you were in Detroit?

A. Yes, sir.

Q. And did you ever tell him that you saw any part of it, how it occurred?

A. I suppose I told him, possibly, at that time, what I saw of it.

Q. Mr. Bauman is not in court, is he?

A. No, sir.

Q. Where does your brother live, C. F. Bauman?

A. Decatur.

151 Q. What is his residence address there?

A. I couldn't tell you.

Q. Do you know any way that we could reach him there by telegram or telephone?

A. Well, his address has been—he moved since I was there this summer. He was 715, I believe, Center street, this summer. That is the only address I know of.

Q. But you say you don't know whether you ever told him you ever saw any of it or not?

A. I wouldn't say I did; no.

Q. Did you ever tell Fisher, another brakeman on that train, that you saw any of it?
A. I don't know that I told him; no.
Q. You never told Mr. Hammer, who was also there, that you saw any of it?
A. I don't know as I told him anything or not.

Redirect examination.

By Mr. Reeder:

Q. This appears to be made by you on March 16th, 1918?
A. Yes, sir.
Q. That was two days after the accident occurred?
—. —— ——.
Q. Had you seen this paper, or read this paper, before you testified today?
A. No, sir.
Q. You have not?
A. No, sir.
Q. Did you receive any information or request from Mr. Able or from Mr. Noell, counsel for the plaintiff, to come to St. Louis for this trial?
A. No, sir.

Recross-examination.

By Mr. Able:

Q. You were discharged from the Chicago & Eastern Illinois Railroad Company, when?

152 Mr. Reeder: I object to that question as improper.
Mr. Able: I wish to lead up to another question, and that is this: I want to ask the witness if he hasn't had trouble getting other railroad work, and if he is not unable now to get railroad work, and if he isn't anxious——
Mr. Reeder: That is an improper statement of counsel.
Mr. Able: I think I am entitled to show anything that would tend to show the witness' interest and to tend to show why a man would testify as he has testified.
Mr. Hocker: Mr. Able seems to know an awful lot about this case.
The Court: He may answer.
To which ruling of the Court defendant then and there duly excepted, and still continues to except.

Mr. Able:

Q. The Court says you may answer.
A. Well, what is the question?
Q. Were you discharged from the Chicago and Eastern Illinois Railroad Company?

A. I don't remember what date it was.
Q. You don't remember the date?
A. No, sir.
Q. But you were discharged?
A. Yes, sir.
Q. And since that time you have made application to other railroads, haven't you, for employment?
A. No, sir.
Q. Haven't you?
A. No, sir.
Q. Not a one?
A. No, sir; not a one.
Q. And are you planning to go back into railroad work?
A. Not while I got my right mind; no.

153 Q. Does this paper that the jurymen are now looking at, which purports to be a personal injury report made out by you two days after the accident, state anywhere on it the place where you were when you saw all of this?

Mr. Reeder: I think the paper speaks for itself.
Mr. Able: The paper probably does, but I thought this witness might know it.
Mr. Reeder: That is not fair. He hasn't seen the paper and hasn't read it, and hasn't seen it for two years. The paper can tell what is on it.

Mrs. S. G. BLACKWELL, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. State your name, please.
A. Mrs. S. G. Blackwell.
Q. Are you the wife of Mr. S. G. Blackwell, the gentleman that testified this morning?
A. Yes, sir.
Q. Where do you live, Mrs. Blackwell?
A. Bourbon, Illinois.
Q. Were you living there on the 14th of March, 1918?
A. Yes, sir.
Q. Did you see Mr. Wolfe hurt?
A. Well, I saw part of the accident.
Q. You saw part of the accident?
A. Yes, sir.
Q. Where were you at that time?
A. I was sitting in the bay window of the telegraph office, sitting upon the instrument table.
Q. What kind of a window is that there?

A. A bay window, with three windows.

154 Q. With reference to those windows, where did Mr. Wolfe fall; was it in front or north or south?

A. Well, it seemed to be just a little bit north.

Q. A little bit north of the window?

A. Yes, sir.

Q. Could you see that position from the position you were in in the station?

A. Well, which?

Q. The place where he fell?

A. Yes, sir.

Q. Just tell the jury what you saw, Mrs. Blackwell.

A. Well, I saw him just swing around the end of the car, right between the cars, and then I didn't see any more; I covered my face.

Q. You saw him swing around between the cars?

A. Yes, sir; between the two cars. I didn't see him fall. I just saw him swing around those cars, and I knew he was going to fall.

Q. Do you know where your husband was, Mr. Blackwell, at that time?

A. Well, he went out, I knew, to exchange bills, but I didn't see him at the time, but I knew he was out there some place.

Cross-examination.

By Mr. Able:

Q. If Mr. Blackwell had been exchanging bills, waybills, with Mr. Wolfe at that time, why, of course, he would have been right there where you could have seen him, wouldn't he?

A. Not necessarily.

Q. Well, that bay window, has it bays all around?

A. I was looking out the front window.

Q. And you were looking right straight out the window leading to the north, were you?

A. Not straight out of the window.

Q. I say, almost straight out in front, except you were a little bit farther north than your windows?

A. I don't understand what you mean?

155 Q. As I understand you, the accident occurred almost opposite this window, except a little bit farther to the north?

A. It was north.

Q. There was nothing there to obstruct your vision, was there, out that way; you could see Mr. Wolfe?

A. Yes, sir.

Q. And you could see him swing around there on the handhold, could you?

A. I think the reason I didn't see my husband was because I just wasn't looking at him. I was looking at Mr. Wolfe—I didn't notice.

Q. And you didn't see your husband there at all?

A. No, but I knew he was out there.

Q. You knew he had gone out, because he had gone out the side door and left you and Mr. Hammer in there just before, hadn't he?
A. Yes, sir.
Q. He just walked out just before this occurred?
A. Yes, sir.
Q. Your husband is still station agent there?
A. Yes, sir.
Q. And when Mr. Noell came up, attorney for the plaintiff, you told him that you couldn't tell him anything, because you didn't see any of it, didn't you?
A. I didn't tell him I didn't see it.
Q. But you wouldn't make him a statement about it?
A. He didn't ask me for a statement.
Q. Didn't you, Mrs. Blackwell, tell Mr. Noell you were sitting wn at a desk with your back turned?
A. No, I did not. I told him I was sitting upon a table. I told im just what I told you.
Q. And you are quite sure, though, you didn't see Mr. Blackwell out there?
A. No, I didn't see him.

156 Redirect examination.

By Mr. Reeder:

Q. You said your husband went out just a short time before that; how long had he been out there?
A. Well, I couldn't say—he had just gone out there, but I don't know how long it was, not very long, though.
Q. How long do you mean, had he gotten out of the door, or what time have you reference to?
A. Well, he had gotten out of the door, but I didn't see him out there. I knew he was out there; I saw him leave the door, saw him going out of the door.
Q. You say the car was north of the window you were looking out of?
A. Just a little bit; yes.
Q. You say Mr. Wolfe swung around, did he swing to the rear or to the front; you say he swung around; did he swing to the rear or to the front?
A. Well, to the front of one car and the rear of another.
Q. Well, did he swing to the rear of the front car he was riding on?
A. Oh, to the rear.
Q. To the rear?
A. Yes, sir.
Q. Could you tell what he was on, whether he was on——
A. No, sir; I don't know what he was on, I just never noticed.
Q. You didn't pay any particular attention to that.
A. No, I wasn't paying any attention to that.

L. H. MILLER, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hocker:

Q. Doctor, please state your name to these gentlemen.
A. L. H. Miller.
157 Q. And you live where?
A. At Pana, Illinois.
Q. How long have you lived there?
A. About twenty-eight years.
Q. You are a regular graduate of a school of medicine and surgery?
A. Yes, sir.
Q. Where did you graduate, doctor?
A. In Chicago.
Q. And when?
A. In 1909.
Q. You have practiced your profession since that time at Pana?
A. Yes, sir.
Q. In connection with anybody?
A. In connection with my father.
Q. Do you bear any relation to the Chicago & Eastern Illinois Railroad Company; do you do any work for them?
A. I act as their local surgeon, in conjunction with my father.
Q. You are in the general practice?
A. Yes, sir.
Q. What proportion of your business is the railroad business, would you say?
A. Not very much; it varies, but I would say perhaps, counting all I do and the injuries of minor and major causes, probably one a month.
Q. Your general business is the general practice, then, I suppose?
A. Yes, sir.
Q. Do you know Mr. Wolfe here, the plaintiff?
A. Yes, sir.
Q. Did you operate on him?
A. Yes, sir.
Q. I believe it was the 14th of March?
A. Yes, sir.
Q. That he came to the hospital there—was there a hospital there?
A. Yes, sir.
Q. What kind of a hospital; was it a general hospital or a private hospital, or what?
A. No, it is called the Huber Memorial Hospital. It is conducted by an order of Sisters—it is a Catholic hospital.
158 Q. Did you personally operate on Mr. Wolfe?
A. Yes, sir.

Q. What time was that?
A. Well, about 7 o'clock in the evening, I believe.
Q. And, of course, he was put to bed after the operation?
A. Yes, sir.
Q. And continued there in the hospital under your care and treatment for how long?
A. I think it was the 31st of March that he went home—a little over two weeks.
Q. Was he discharged then?
A. Well, he wasn't discharged. I continued treating him at home. He was discharged from the hospital, but he wasn't well.
Q. Well, now, doctor, have you a record kept at the hospital there, showing his temperature and his pulse and all of those things?
A. Yes, sir.
Q. Have you refreshed your recollection as to the three days after the operation, which would be the 17th, as to what was his condition?
A. Yes, I looked over the whole record.
Q. Yes. What was his condition on the 3rd day after the accident?
A. Well, generally, he was in pretty good shape.
Q. What was his mental condition?
A. It was clear.
Q. Was he able at that time—was he in such physical and mental condition as that he could give an intelligent statement of how the accident happened?
A. Yes, sir.
Q. Did you talk to him about how the accident happened on that day?
A. Yes, sir.
Q. And what was the statement he made with reference to how the accident happened?
A. Well, he said he was leaning out from the side of the
159 car to give and receive some papers from the agent at Bourbon, Illinois, and in reaching, he overreached, and his hold slipped and in falling his arm was run over by the train. That is about as near as I can give it.
Q. Were you present when Mr. Swanson took the written statement from him?
A. I don't remember whether I was or not.
Q. You have no recollection of it?
A. No, sir; I don't remember that.
Q. And you have no recollection of ever having seen his statement?
A. No. I took a record for the company myself.
Q. A memorandum of the statement?
A. Yes, sir; and other than that I have no recollection.
Q. Now, what was his temperature that day?
A. It was normal.
Q. And his pulse?
A. His pulse was pretty nearly normal. It run about 90-88-

long in there, according to the record, and the temperature was normal.

Q. What is the normal pulse?

A. It varies from about 75 to 80 or 85 in the normal adult.

Q. And his pulse was approximately normal, was it?

A. Yes, sir.

Q. And his mental condition such as to remember and narrate occurrences of the kind that he described to you?

A. Yes, sir.

Cross-examination.

By Mr. Able:

Q. Did you bring that record with you, doctor?

A. Yes, sir.

Q. Doctor, three days after—you operated on him on March 14th, the same day the accident occurred?

A. Yes, sir.

160 Q. And you say that three days after it he was in pretty good condition?

A. Yes, sir.

Q. Yet you had a sign on the door that kept all visitors out, did you?

A. Yes, sir.

Q. You had that?

A. Yes, sir.

Q. You didn't even let his mother and father and sisters in, and only permitted his wife to go in at that time; isn't that a fact?

A. I have no remembrance of that, but I remember, because I do that with any serious case. I usually advise them to keep them all out and tell them that it is according to my orders, to prevent them from being worried.

Q. But you did let a claim agent, a Mr. Swanson, go in, when you wouldn't let others, and you let Mr. Swanson go in there for business purposes, and the purpose of that visit was likely to cause Mr. Wolfe worry, wouldn't it?

A. He was in the room; yes, sir.

Q. You let him in?

A. Yes, sir.

Q. You didn't object to him going in?

A. No, sir.

Q. You are still doing that kind of work, surgery for the Chicago and Eastern Illinois Railroad Company?

A. Yes, sir; I am still local surgeon.

A. R. SWANSON, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hocker:

Q. Will you please state your name?
A. A. R. Swanson.
Q. Where do you live, Mr. Swanson?
A. Chicago, Illinois.
161 Q. What is your occupation?
A. Assistant claim agent.
Q. For whom?
A. Chicago and Eastern Illinois Railroad Company.
Q. And were you an assistant claim agent while the railroad was in the Government's hands, and so operated?
A. Yes, sir.
Q. And how long have you held that position as assistant claim agent?
A. I have been in the claim department since October, 1917.
Q. And were you in the employ of that company prior to that time?
A. Yes, sir.
Q. In what capacity?
A. As chief clerk of the trainmaster, at Villa Grove, Illinois.
Q. How long had you known Mr. L. A. Wolfe, the plaintiff?
A. Well, I have known him for probably eight or nine years.
Q. He was the brakeman and conductor on the division that went through Villa Grove?
A. He was the conductor.
Q. And had been conductor since 1906, I believe. Is it part of your duty as claim agent to take statements of witnesses and injured people who may have claims against the railroad or against the administration while it was in the hands of the Government?
A. Yes, sir.
Q. And at the time that this accident happened on the 14th of March, do you recall where you were?
A. Well, I don't really recall where I was at the time.
Q. You were out on the road, more or less?
A. Yes, sir.
Q. When was it you first saw Mr. Wolfe with reference to
162 this accident; the 14th day of March is the date of happening of the accident?
A. Three days afterwards.
Q. He was then in Pana, in the hospital?
A. Yes, sir.
Q. Had you seen any of the other witnesses before you saw Mr. Wolfe?
A. No, sir.
Q. He was the first one that you interviewed?

A. Yes, sir.
Q. And you came to Pana and saw him at what time?
A. I believe it was during the morning; I don't know just what time.
Q. During the forenoon?
A. Yes, sir.
Q. You had word about the accident and were investigating it?
A. Yes, sir.
Q. You don't recall the exact hour of the morning?
A. No, probably along about 10 o'clock. I wouldn't say definite.
Q. Did you see anybody else at the hospital at the time you had this talk with Mr. Wolfe?
A. I saw the nurse there.
Q. And anybody else?
A. I don't distinctly remember.
Q. Do you remember whether you saw the doctor or not, Dr. Miller, who just testified?
A. No, I am satisfied I didn't see the doctor.
Q. Well, when you saw Mr. Wolfe he was in bed, of course?
A. Yes, sir.
Q. And did you ask him questions about the accident?
A. Well, I went in there and when I went into his room, he knew me, of course, and I asked him how he was getting along, and he said he was getting along fine, and we had quite a chat in there, and then he told me how the accident occurred, and he made
163 a statement of it, after which I read it to him, and then we had another little chat, and then I handed it over to him and he read it.
Q. Handed what, the statement?
A. Yes, sir; the statement, and he read it, and after he read it, he sat up in bed, and he told me it was all right, and sat up in bed and signed it.
Q. And signed each of these pages, did he?
A. Yes, sir.
Q. Is this the statement you took and which was signed by him, which is marked as "Defendant's Exhibit 2"?
A. Yes, sir.
Q. Now, did you get the facts and information contained in this statement from any other source than from Mr. Wolfe?
A. From no other source than Mr. Wolfe.
Q. Did you correctly put in narrative form the facts that he gave here?
A. Put the facts as he gave them to me.
Q. And I understand you read it over to him and you handed it to him to read?
A. Yes, sir.
Q. Then he signed his name on these separate pages, as shown by the statement?
A. Yes, sir.
Q. Outside of the brief report of the facts of the accident, had you any knowledge of these details except as you got them from Mr. Wolfe?

A. No, sir.

Mr. Hocker: I don't believe I have put this in evidence, but I will do it now as Defendant's Exhibit 2.

(Mr. Hocker hands paper to the jury to read.)

Said Defendant's Exhibit 2 is in words and figures as follows, to wit:

164 DEFENDANT'S EXHIBIT 2.

Pana, Ill., Mar. 17, 1918.

My name is L. A. Wolfe. I was 36 years of age on my last birthday, which was the 3d day of March. I am employed by the C. & E. I. Railroad as conductor and have been in continuous service since November, 1905, as brakeman and conductor. I was promoted to position as conductor in April, 1906. I have been conductor in charge of local freight trains 160 and 161, running between Villa Grove and Pana, for the past five years. I had charge of local freight trains 162 and 163, running between Findlay and Salem yard, previously to taking charge of trains 160 and 161, being on these runs for about a year.

In connection with accident which occurred at Bourbon on March 14th, when I sustained injury to my left arm.

We were called to leave Pana on train #160 for on time, which

L. A. WOLFE.

is 6.30 a. m., train consisting of about twelve cars, one empty and the balance cars loaded with merchandise and corn for various points.

When we arrived at Bourbon, in addition to taking water on engine 887, it was the intention to set out a car of scrap iron at that point and pick up a car of corn, but, owing to my accident, we did not do either. I do not recall at this time number of the car we intended to set out or number of the car that we were to pick up.

The water crane is just about at the south end of the station platform, and the station track on which we were to pick up

165 the car of corn and set out the car of scrap is located on the east side of the northward main, and the switch leading

L. A. WOLFE.

from the northward main to this team track is located about 25 car lengths north of the station.

When we stopped to take water at Bourbon, I got off the caboose and started to walk up along the west side of my train between the northward and southward mains, as we had picked four or five cars at Arthur from the Vandalia and all around there loaded with flour and corn, and I wanted to get the seal record on these cars. I had not got more than three or four of these cars checked when the train started to proceed. I do not know whether engineer whistled off before starting train or not. When train started up, I caught the south end of B. L. E. car 80993, I think is the number, and

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got up on the ladder on the west side of this car at the south end with both of my feet on the lower grab iron next to the stirrup which is located on the end sill or lower corner of body of car. The train was moving possibly three or four miles an hour when the car I was riding on approached the station, and as I was approaching station the agent came out of the station building with a bill and message in his hand to hand to me and I had a bill in my hand to give him. It was the intention to make the exchange of bills as I passed by, as the waybill he had covered car I was to pick up and the one I was to hand him covered the car I was to set out. The car I was on was a pretty high car, and I was holding onto possibly

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166 the fifth or sixth grab iron with my right hand, and as I leaned toward the agent, who was standing in between the two main tracks in front of the station, to hand him the bill I had with my left hand and receive the one he had, both of my feet must have slipped off the grab iron, as the grab irons and stirrup on the side and end of the car I was riding were in good condition, and as I fell to the ground I must have turned around, as I was in a sitting position facing the south, as I remember I could see the car that was next to the one I was riding coming toward me, but as I fell between the car I was riding and the one next to it, I was unable to get my arm off the rail on account of the car being so close and the north wheel on west side of this car following, or

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possibly the north truck passed over my left arm right at the shoulder. I was taken to Tuscola and given first aid attention there. I was then placed on #21 for Pana and taken to the hospital, where my arm was amputated about seven o'clock the same evening by Dr. L. H. Miller.

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Mr. Hocker:

Q. When you were talking with Mr. Wolfe and obtained the information which was put into this statement, I will ask you how seemed to be his mind, his mental operation?

A. Normal state of mind.

Q. He seemed to be able to state the facts, without difficulty?

A. Yes, sir.

Q. And how long would you say you were there, taking

167 this statement?

A. Well, I suppose I visited with him for an hour and a half.

Q. Did his condition seem to change at any time?

A. No, sir.

Q. And each one of these pages is in your handwriting and was signed by him, while you were there?

A. Yes, sir.

Cross-examination.

By Mr. Able:

Q. Mr. Swanson, I understood you to say to Mr. Hocker that the plaintiff was the first one that you had interviewed at all with reference to this accident, is that correct?

A. Yes, sir.

Q. Then at the time you went to see the plaintiff you didn't know that this handhold at the north end of this B. & L. E. car, 80993, had been inspected by some eight or nine people, including three inspectors; you didn't know that they had found that handhold to be in bad condition, did you?

A. No, sir.

Q. You didn't know that at all?

A. No, sir.

Q. And yet in this statement that you took from the plaintiff, in no less than six places throughout that statement, it is written so that it couldn't have happened to the plaintiff at any place except on the south end of that car; isn't that a fact?

A. That is what he told me.

Q. And you didn't know that it was material at that time at all, to show, did you, that this occurred on the opposite end of that car?

A. I didn't know it.

Q. You didn't know that was material to the case at all?

A. No, sir.

Mr. Able: May I mark under the words, in the various places, just right under them?

168 Mr. Hocker: I would rather you didn't mark that. It may be necessary to use it again some time, and I would rather not have it mutilated.

Mr. Able: All right.

Mr. Able:

Q. I will ask you if in this statement, if in four different places, you didn't mention that it occurred on the south end of the car, and things that would indicate that it couldn't have been at the other end that the grab iron was——

Mr. Hocker: Just a minute, that is argumentative, it seems to me.

Mr. Able:

Q. I will ask you if at that time you didn't know there was any question at all about the condition of the grab iron, did you?

A. I didn't.

Q. You didn't know that at all?

A. No.

Mr. Able: It may be argumentative. I will save it and use it in the argument.

Mr. Able:

Q. You have since talked with three inspectors, a fellow by the name of Grismore, nick-named "Windy," do you know him?
A. I do.
Q. He is down here, isn't he?
A. Yes, sir.
Q. He inspected that car?
A. Yes, sir.
Q. When did you first know he had found the grab iron in this bad condition?
A. I interviewed him Saturday.
Q. Saturday of last week?
A. Yes, sir.
Q. That was the first time you had ever seen him?
A. Yes, sir.
Q. And never had seen any of the reports or anything of the condition the car was in?
A. I don't handle those things.
Q. And another inspector by the name of Ben something—I don't know his last name—he is in court, isn't he?
A. Ben who?
169 Q. He is a baldheaded man——
A. I don't know any Ben.
Q. How did you get information about this accident up at Chicago, or wherever you were, to go down to investigate it?
A. Mr. Fowler asked me to investigate it.
Q. And you didn't have any reports about it or anything to go by?
A. He told me Mr. Wolfe had met with an accident, and for me to investigate it and find out the facts.
Q. You didn't have the personal injury report to give you any witnesses' names and addresses, or anything?
A. No, sir.
Q. You just went down in that locality and started to work?
A. That is the reason I called on Mr. Wolfe at first, in order to find out the circumstances from him.
Q. You called on him the very first one?
A. Yes, sir.

A. MUMS, a witness of lawful age, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Hocker:

Q. Will you state your name, please?
A. A. Mums.
Q. Where do you live, Mr. Mums?
A. Villa Grove, Illinois.
Q. And what is your employment?

A. Car inspector.
Q. For the Chicago & Eastern Illinois Railroad Company?
A. Yes, sir.
170 Q. Did you work for that railroad during the period that the Government was running it under the Railroad Administration?
A. Yes, sir.
Q. And how long have you been working for it, first and last?
A. About ten years or better.
Q. You recall to have heard of the accident to Mr. Wolfe, do you?
A. Yes, sir.
Q. And that car was taken to Villa Grove, I believe, where you were stationed?
A. Yes, sir.
Q. And did you examine the car?
A. Yes, sir.
Q. Did you examine the front end of the car; that is, the—in order to make it clear, I will ask you this—I don't know how it was standing when you looked at it—did you examine the ladder end of the car, where the ladder is?
A. Yes, sir.
Q. On the west side?
A. Yes, sir.
Q. Did you see—was there anything wrong with the ladder there?
A. No, sir.
Q. Anything loose?
A. Not at the ladder end.
Q. At the other end, just state to the jury what the situation was, what the condition was, what is termed here the north and south end; just describe to the jury what you found and saw there.
A. Well, I found the grab iron loose on the north side of the car.
Q. Can you describe it a little more in detail, as to what it was?
A. It seemed like the hole was kind of worn in the wood.
Q. What play did it have and in what direction was the play?
A. Well, the play was up and down.
Q. About to what extent?
A. Oh, about an inch, I should judge.
171 Q. Was there any play out and in?
A. No, sir.
Q. The play was up and down?
A. Yes, sir.
Q. And that was caused by the hole being enlarged, somewhat?
A. Yes, sir.
Q. And which end of it was that?
A. It was on the north end.
Q. That would be the end nearest to the end of the car?
A. Yes, sir.
Q. Nearest to the near end of the car?
A. Yes, sir.
Q. Well, what was done about the car?

A. Well, we put a bad order card on it and held it for inspection.
Q. And then was it inspected any more?
A. Yes, sir.
Q. Was the condition the same then when it was inspected as it was when you inspected it?
A. Two inspectors.
Q. I say, was there any change in the condition from the time you inspected it until the other man inspected it?
A. Not that I know of. I didn't inspect it only once.

Cross-examination.

By Mr. Able:

Q. Well, now, as an inspector, do you pass cars with grab irons in the condition that this iron was in?
A. Well, not very often.

Redirect examination.

By Mr. Hocker:

Q. Does "bad order" mean to hold for further inspection?
A. Yes, sir.
Q. That is what you did?
A. Yes, sir.

172 Recross-examination.

By Mr. Able:

Q. Doesn't "bad order" mean to put it on the rip track to repair?
A. No, we have to bad order them to keep them from being put in the train and putting them through. We have to hold them.
Q. Do you know what was done with this car?
A. Well, it was put on the lead into the repair track.
Q. And when it got on the lead where did it go?
A. It stood on the lead until the next day.
Q. Then where did it go?
A. Well, I think they taken the picture the next day.
Q. Did they take a picture showing how much play there was in it; did they take any closeup picture, closeup to the grab iron?
A. Not as I know of.
Q. Well, what was done after the picture was taken of the car?
A. I couldn't say.
Q. Did you have anything to do after you inspected the car to say whether it should go on the repair track or not?
A. Well, yes, sir.
Q. Well, what did you do when you inspected the car and found it had to go in the repair shop?
A. Well, we put a card on it and sent it to the repair shop.
Q. Did you put a card on the car?
A. Yes, sir; we would put a card on them to hold them for in-

spection. That is the way they all do after a fellow gets hur on them.

173 O. C. GRISMORE, a witness of lawful age, being first dul sworn to tell the truth, the whole truth and nothing but th truth, testified as follows:

Direct examination.

By Mr. Reeder:

Q. What is your name?
A. O. C. Grismore.
Q. Where do you live?
A. Villa Grove.
Q. What is your business?
A. Car inspector.
Q. Were you working in that capacity on the 14th of Marc 1918?
A. Yes, sir.
Q. Did you examine B. & L. E. car number 80993, that came on local 160, on March 14th?
A. Yes, sir.
Q. Where was the car when you examined it?
A. Local train.
Q. Where?
A. In the local train.
Q. Did you examine it upon its arrival?
A. Yes, sir.
Q. This is a picture of the car as it came in to Villa Grove, being the north end and this is the south end, and this was the side of it; I will ask you what condition you found the ladder at the south, or ladder end of the car?
A. The ladder was o. k.
Q. Did you examine this grab iron at the north end, indica by an arrow?
A. Yes, sir.
Q. What was its condition?
A. I found it loose and had about an inch play in it.
Q. Which way?
A. Up and down.
Q. Just an inch play? You mean an inch—the grab iron on outside was an inch?
A. The grab iron on the outside worked up and down abou inch.
174 Q. With reference to the nuts, what condition were in, the nuts or bolts?
A. They were put on there according to the safety appliance r
Q. Were they tight?
A. Yes, sir; riveted over.
Q. Were any repairs made to this grab iron at Villa Grov
A. Not as I know of.

Q. Was it bad ordered by anybody?
A. It had a bad order card, "Hold for inspection," and there were no orders to make any repairs at all by me.
Q. Was the car repaired?
A. Not that I know of.
Q. It was not considered by you as in need of repair?
A. No, sir.

Cross-examination.

By Mr. Able:

Q. Are you still working for the Chicago & Eastern Illinois?
A. Yes, sir.
Q. And you say you passed and let this car go out without repairing it, when it had a movement of at least an inch up and down in it, is that correct?
A. Yes, sir.
Q. And you say that the nut on the end of this hadn't come unscrewed any, because it was riveted over?
A. Yes, sir.
Q. And, in other words, it couldn't come unscrewed?
A. No, sir.
Q. What had given it this play of an inch?
A. A little bit of a loose place in the wood there, an enlarged hole it was, which worked up a little bit.
Q. What was that, a worn place, or what?
A. A lttle worn place in the wood, in the side sheeting of the car.
Q. And you believe it was caused by a gradual wearing or breaking, of some kind?
A. It looked like a kind of gradual wearing and it made
175 it a little bit loose, to work up and down.

Mr. Hocker: We have several more inspectors who have seen this car, but the testimony is simply cumulative to what has already been offered, and I don't intend now to put them on, but Mr. Able may put them on, if he desires to. I will give him their names and permission to put them on, if he wishes to.

Mr. Able: As you say, I think it would be cumulative, and we won't put them on, either.

Plaintiff rests.

Defendants rest.
This was all the evidence offered or introduced in the case.

Thereupon, at the close of the whole case defendant, by his counsel, presented to the Court in writing, and requested the Court to give and read to the jury, the following instruction, in the nature of a demurrer to the evidence:

"Now, at the close of all the evidence herein, the Court instructs the jury that under the pleadings and all of the evidence in the case, plaintiff is not entitled to recover and the verdict of the jury must be for defendant."

Which instruction the Court refused to give and read to the jury; to which action and rulings of the Court, in refusing to give said instruction defendant, by his counsel, then and there duly excepted and still continues to except.

176 Thereupon, at the instance and request of plaintiff, the Court gave and read to the jury the following instruction:

Plaintiff's Given Instruction.

"The Court instructs the jury that if you find and believe from the evidence that the plaintiff was injured on or about the 14th day of March, 1918, in Bourbon, Illinois, and if you further find and believe from the evidence that at the time he was injured he was the conductor of freight train number 160, and if you further find and believe from the evidence that at such time freight train number 160 was moving northwardly on the northbound main track of the Chicago & Eastern Illinois Railroad Company, and if you further find and believe from the evidence that there was a car initialed B. & L. E. and numbered 80993 in train number 160 at the time which contained corn shipped from Arthur, Illinois, and which was at the time en route to Terre Haute, Indiana (if you so find), and if you further find and believe from the evidence that the plaintiff, Lee A. Wolfe, was at the time riding on the side of the said car initialed B. & L. E. and numbered 80993, holding to a grab iron on the west side near the north end of the aforesaid car in the aforementioned train, if you find that it was in said train, and if you further find and believe from the evidence that at that time the train was moving at a slow rate of speed, and if you further find and believe from the evidence that the plaintiff, Lee A. Wolfe, gave a stop signal in the performance of his duties as the conductor upon the train, if you so find, to those operating and in charge

177 of the movement of the said engine, and if you further find and believe from the evidence that the fireman was in the cab of the engine on the west side of the train, and if you further find and believe from the evidence that the fireman was looking back toward the plaintiff, and if you further find and believe from the evidence that it was the duty of the fireman to exercise ordinary care to discover, transmit and pass a signal to the engineer, if a signal was given by the plaintiff, and if you further find and believe from the evidence that it was then the duty of the engineer to act upon such signal, if such signal was repeated to him by the fireman, and if you further find and believe from the evidence that the fireman knew that the plaintiff was on the side of the said train and in a position where he would be in danger of being thrown off the train by the sudden increase of the speed of the said train without warning to the plaintiff that the speed was to be increased, and if you further find and believe from the evidence that in the exercise of ordinary care it was the duty of the fireman to exercise ordinary care to look out for signals given by the plaintiff, and if you further find and believe from the evidence that just prior to the time plain-

tiff was injured, if you find that he was injured, plaintiff gave a stop signal, and if you find and believe from the evidence that the fireman either saw the stop signal given by the plaintiff or that if he did not see it that had he exercised ordinary care he could have seen the stop signal, if you find that there was a stop signal given by the plaintiff at the time, and if you further find and believe from the evidence that while plaintiff was giving the stop signal the train slackened up to a slower speed, and if you further find
178 and believe from the evidence that the plaintiff continued to give the stop signal, and if you further find and believe from the evidence that while the said stop signal was being given by the plaintiff those in the engine and in charge thereof gave the engine steam and caused the train to start suddenly forward at an increased rate of speed, if you so find, and if you further find and believe from the evidence that in the exercise of ordinary care those in charge of and operating the engine should not have caused the train to start forward, but should have brought the train to a stop, and if you further find and believe from the evidence that no warning was given to the plaintiff that the train was about to start forward at an increased rate of speed, and if you further find and believe from the evidence that such a movement at such a place under the conditions as they existed there at the time was unusual and unnecessary in the movement then being made, and if you further find and believe from the evidence that the sudden starting forward of the train without any signal from the plaintiff so to do while the plaintiff was given a stop signal (if you find and believe from the evidence that the train was suddenly started forward without any signal from the plaintiff and while the plaintiff was giving a stop signal), contributed to cause the plaintiff to fall from the side of said car and his left arm to be run over and cut off, if you find that the plaintiff did fall from the side of said car and his left arm was run over and cut off, and if you further find and believe from the evidence that at the time the plaintiff was exercising ordinary care for his own safety, and if you further find and believe from the evidence that at the time the grab iron to which
179 the plaintiff wass holding, if you find that the plaintiff was holding to a grab iron, was not securely fastened to the side of the car and that there was some play or movement in this grab iron, and if you further find and believe from the evidence that the north end of the aforesaid grab iron was attached to the car by means of a bolt which ran through the wooden part of the car out through the end of the grab iron, and if you further find and believe from the evidence that the hole in the wooden part of the car through which this bolt passed had been enlarged by a wearing away of the portion of the wood around the hole, and if you further find and believe from the evidence that this permitted some play or movement in the north end of the grab iron, and if you further find and believe from the evidence that this grab iron had been in this condition for some time prior thereto, and if you further find and believe from the evidence that the grab iron in this condition was dangerous and not reasonably safe for the use of the

men working upon and about the said train, and if you further find and believe from the evidence that the defendant or its inspectors could by the exercise of ordinary care have discovered the condition of this grab iron, if you find that the grab iron was in this condition, in time by the exercise of ordinary care to have remedied it, and that they failed and neglected to exercise ordinary care to remedy it, and if you further find and believe from the evidence that the grab iron gave or moved while the plaintiff was holding to it, if you find that plaintiff was holding to it, and that such movement in the grab iron contributed to cause the plaintiff to fall from
180 the side of the said car and to be run over and his left arm cut off, if you find that he did fall from the side of the said car and that he was run over and that his left arm was cut off, and if you further find and believe from the evidence that at the time he received his injuries, if you find that he did receive injuries, and prior thereto the plaintiff was in the exercise of ordinary care for his own safety, and that the plaintiff was not guilty of any negligence that contributed to cause his injuries, then your verdict should be for the plaintiff and against the defendant, and if you find for the plaintiff in this event, under all the evidence in the case, in estimating and determining the measure of his damages, if any, the jury may take into consideration in connection with all the facts and circumstances in evidence the character and extent of the plaintiff's injuries, if any, you find and believe from the evidence he received and whether such injuries, if any, are permanent in their nature, and may find for him such sum as in the judgment of the jury, under all the evidence in the case, will fairly and reasonably compensate him for the injuries you find and believe from the evidence he received, if any, and the Court further instructs you that if you find as above, except that you find and believe from the evidence that at the time the plaintiff was injured, if you find that he was injured, he was not in the exercise of ordinary care and that the plaintiff was at the time guilty of negligence contributing to cause his injuries, if any, then in that event your verdict should be for the plaintiff and against the defendant, but in that event the damages, if any, shall be diminished by you in proportion to the amount of negligence attributable to the plaintiff."

181 To the giving of which instruction on behalf of plaintiff defendant, by his counsel, then and there duly excepted and still continues to except.

At the instance and request of defendant, the Court gave and read to the jury the following instructions:

Defendant's Given Instructions.

I.

"You are also instructed that even though you may find that the defendant was negligent at the time plaintiff was injured, and that such negligence contributed to his injuries, yet if you also find that

plaintiff himself was guilty of negligence contributing to his own injuries, then in the event that you find for plaintiff, you must diminish the damages to which you think he may be entitled in the proportion that the negligence of plaintiff contributed to the accident causing the injuries in question."

II.

"The Court instructs the jury that if you find and believe from the evidence herein that plaintiff was injured because of a mere accident, mischance, or misfortune, without any negligence on the part of the defendant, then your verdict will be for the defendant."

III.

"The Court instructs the jury that if you find and believe from the evidence that plaintiff voluntarily and for his own con-
182 venience attempted to exchange waybills with the station agent while the train was in motion, and while plaintiff at the time was hanging on to and leaning out from one of the cars of the train mentioned in the evidence, and while so doing plaintiff slipped and fell from said car and was injured, and you further find that plaintiff's fall was not caused by any negligent handling of the train or defects in the grab iron or handhold to which plaintiff was holding at the time with his right hand (if you so find), then in that event plaintiff is not entitled to recover and your verdict must be for the defendant."

IV.

"The Court instructs the jury that if you find and believe from the evidence that plaintiff was caused to slip and fall from the car mentioned in the evidence solely from his act in attempting to make an exchange of waybills with the station agent, if you so find while said train was in motion, and while plaintiff was at the time hanging on to and leaning out from one of the cars of said train (if you so find), then plaintiff is not entitled to recover and your verdict must be for defendant."

V.

"The Court instructs the jury that although you may find and believe that there was a loose grab iron on the north or forward end of the car mentioned in the evidence, yet if you further find
183 and believe that plaintiff was at or immediately before his injury hanging on to and leaning out from the side of said car at the south or rear end of said car, at which time plaintiff slipped and fell from said car, and you further find that plaintiff was not caused to fall by any negligent handling of the train, then in that event your verdict must be for the defendant."

VI.

"The Court instructs the jury that the burden is on the plaintiff to establish by a preponderance of all the evidence that at the time of his injury and immediately prior thereto, he was riding on the side of the car mentioned in the evidence, at the north or forward end of said car, and that he must establish by a preponderance of all the evidence that this fall from said car (if you so find) was caused by a loose grab iron or defective iron or by negligent handling of the train; and if the jury find and believe that plaintiff has failed to establish these facts by a preponderance or greater weight of all the evidence, then, in that event, your verdict must be for the defendant."

VII.

"The Court instructs the jury that if they are unable to determine and to find from the evidence whether the plaintiff's injury was the result of a loose grab iron or a sudden jerk of the train, or due to other causes, then the plaintiff cannot recover and your verdict must be for the defendant."

184 Thereupon defendant offered and asked the Court to give the following instructions:

Defendant's Refused Instructions.

"The Court instructs the jury that if you find and believe from the evidence that plaintiff slipped and fell from the car and was injured while he was hanging onto and leaning out from the south or rear end of said car in the act of exchanging waybills with the station agent, while said train was in motion and passing the station of Bourbon, Illinois, and you further find that his fall was not caused by any defects in the grab iron or bar to which plaintiff was at the time holding with his right hand, if you so find, or by any negligent handling of the train, then the Court instructs you that plaintiff's injury was the result of an accident for which defendant is not responsible, and your verdict must be for the defendant."

"The Court instructs the jury that it is admitted that plaintiff at the time of his injury was the conductor in charge of and operating defendant's train, and you are further instructed that if you find and believe from the evidence that plaintiff at the time voluntarily and for his own convenience attempted to make an exchange of waybills with the station agent at Bourbon, Illinois, while he was at the time hanging onto and leaning out from one of the cars of said train while the train was in motion passing said station, and you further find that plaintiff knew, or by the exercise of ordinary care on his part could have known that his act in so doing was dangerous, if you so find, then the plaintiff is not entitled to recover, if it further
185 appears from the evidence that the safe, proper and usual way was to bring his train to a stop while delivering waybills to and receiving waybills from said station agent."

The Court refused to give said instructions as requested, but, after modifying same, gave and read to the jury in their modified form; said instructions, so modified, being as follows:

Court's Modified Instructions.

"The Court instructs the jury that if you find and believe from the evidence that plaintiff slipped and fell from the car while he was hanging onto and leaning out from the south or rear end of said car in the act of exchanging waybills with the station agent, while said train was in motion and passing the station of Bourbon, Illinois, and you further find that his fall was not caused by any defects in the grab iron or bar to which plaintiff was at the time holding with his right hand, if you so find, or by any negligent handling of the train, then your verdict must be for the defendant."

"The Court instructs the jury that it is admitted that plaintiff at the time of his injury was the conductor in charge of and operating defendant's train, and you are further instructed that if you find and believe from the evidence that plaintiff at the time voluntarily and for his own convenience attempted to make an exchange of waybills with the station agent at Bourbon, Illinois, while he was at the time hanging onto and leaning out from one of the cars of said train while the train was in motion passing said station, and
186 you further find that plaintiff knew, or by the exercise of ordinary care on his part could have known that his act in so doing was dangerous, if you so find, and if you find that plaintiff's so doing was the sole cause of his injury, then plaintiff is not entitled to recover, if it further appears from the evidence that the safe, proper and usual way was to bring his train to a stop while delivering waybills to and receiving waybills from said station agent."

To which refusal of the Court to give and read said instructions to the jury, in the form as asked, and to which action of the Court in modifying the same as aforesaid, and in giving and reading to the jury of its own motion said instructions so modified, defendant, by its counsel, then and there duly excepted, and still continues to except.

Instructions Given on Court's Own Motion.

Of its own motion, the Court gave and read to the jury the following instructions:

I.

"The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight they will take into consideration the character of the witness, his manner on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling towards the parties to the suit, the probability or improbability of his or her statements, as well as all
187 the other facts and circumstances given in evidence. In this connection you are further instructed that if you believe that

any witness has knowingly sworn falsely to any fact or facts material to the issues in this case, you are at liberty to reject all or any portion of such witness' testimony."

II.

"The Court instructs the jury that the burden of proof is on the plaintiff to establish by the preponderance or greater weight of the evidence, the facts necessary to a verdict in his favor under these instructions.

By the terms 'burden of proof' and 'preponderance of the evidence,' the Court intends no reference to the number of witnesses testifying concerning any fact, or upon any issue in the case, but simply uses those terms by way of briefly expressing the rule of law, which is, that unless the evidence (as to such issue) appears in your judgment to preponderate, in respect to its credibility, in favor of the party to this action on whom the burden of proof (as to such issue) rests, then you should find against such party on said issue."

III.

"What constitutes 'ordinary care' as mentioned in these instructions depends on the facts of each particular case. It is such care as a person of ordinary prudence would exercise (according to the usual and general experience of mankind) in the same situation and circumstances as those of the person or persons in this case
188 with reference to whom the term 'ordinary care' is used in these instructions. The omission of such care is negligence in the sense in which that word is used in these instructions."

IV.

"The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it."

To the giving of which instructions of the Court's own motion, and each of them, defendant, by his counsel, then and there duly excepted and still continues to except.

Defendant's Refused Instructions.

Defendant presented to the Court, in writing, and requested the Court to give and read to the jury the following instructions:

"The Court instructs the jury that under the evidence in this case the jury cannot find in favor of the plaintiff upon the charge that the train mentioned in the testimony was negligently or improperly handled."

"The Court instructs the jury, that although you may find and believe that there was a loose grab iron on the side of the car
189 mentioned in the evidence at the north or forward end of said car, yet, if you further find and believe that plaintiff, at the time or immediately before his injury, was hanging on to and leaning out from the said car at the south or rear end, at which time plaintiff slipped and fell from said car, receiving the injury mentioned in the evidence, then, in that event, plaintiff is not entitled to recover, and your verdict must be for defendant."

Which instructions, and each of them, the Court refused to give and read to the jury; to which action and ruling of the Court in refusing to give and read said instructions to the jury, and each of them, defendant, by his counsel, then and there duly excepted and still continues to except.

Under the instructions of the Court, on the seventeenth day of November, 1920, at the November Term, 1920, of said court, the jury returned into court the following verdict (omitting caption and signatures):

Verdict.

"We, the jury in the above cause, find in favor of the plaintiff, on the issues herein joined, and assess plaintiff's damages at the sum of fifteen thousand ($15,000) dollars."

On the nineteenth day of November, 1920, during the same term of said court, and within four days after the trial of said cause and the rendition of said verdict, defendant filed his motion for
190 a new trial, which is, in words and figures, as follows (omitting caption and signature):

Defendant's Motion for a New Trial.

Now at this time and within four days after the rendition of the verdict therein comes the defendant and moves the Court to set aside the verdict rendered in said cause on the 17th day of November, 1920, and to grant him a new trial of the issues joined herein, for the following reasons, to wit:

1. The verdict in said cause is against the evidence, against the weight of the evidence and against the law under the evidence.

2. The verdict was for the wrong party.

3. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.

4. The Court erred in rejecting competent, relevant and material evidence offered by the defendant.

5. The Court erred in overruling the demurrer to the evidence offered at the close of the plaintiff's case.

6. The Court erred in overruling the demurrer to the evidence offered at the close of the entire case.

7. The Court erred in giving to the jury, at the request of the plaintiff and over the objection and exception of the defendant, instruction number 1, consisting of five (5) typewritten pages.

8. The Court erred in giving and reading to the jury of its own motion instructions numbered 11, 12, 13 and 14.

191 9. The Court erred in refusing to give to the jury instruction number 2 requested by defendant at the close of plaintiff's case and in the nature of a peremptory instruction to find for the defendant.

10. The Court erred in refusing to give to the jury instruction number 3 requested by defendant at the close of the entire case and in the nature of a peremptory instruction to find for the defendant.

11. The Court erred in refusing to give to the jury instructions numbered 10 and 12 requested by the defendant.

12. The Court erred in refusing to give to the jury legal, proper and correct instructions requested by the defendant.

13. The damages assessed by the jury in its verdict are excessive.

14. Because the damages assessed by the jury in its verdict are so excessive as to show that the verdict was prompted and rendered by reason of passion, prejudice and bias or mistake on the part of the jury.

15. Because upon the whole record the verdict of the jury and the judgment of the Court should have been for the defendant.

Motion for New Trial Overruled.

On the 7th day of February, 1921, during the February Term 1921, of said court, by an order duly laid and entered of record the Court overruled defendant's said motion for a new trial; to which action, ruling and order of the Court, in overruling said motion for a new trial, defendant, by his counsel, then and
192 there duly excepted and still continues to except.

On the 11th day of February, 1921, during the February Term, 1921, of said court, defendant filed his affidavit for appeal in said cause, in words and figures as follows (omitting caption):

Affidavit for Appeal.

STATE OF MISSOURI,
City of St. Louis, ss:

William O. Reeder, being duly sworn, upon his oath says that he is the attorney and agent for the above-named defendant, John

Barton Payne, Director General of Railroads, designated agent provided for in Section 206 of the Transportation Act of 1920, and as such is authorized to make this affidavit for and on behalf of said defendant.

Affiant further states upon his oath that the appeal prayed for by the defendant, appellant herein, is not made for vexation or delay, but because this affiant verily believes the defendant, appellant herein, to be and is aggrieved by the judgment and decision of the Circuit Court herein.

WILLIAM O. REEDER.

Subscribed and sworn to before me this 11th day of February, A. D. 1921.

My commission expires March 2, 1923.

[SEAL.] EDWARD W. LAKE,
Notary Public.

193 Whereupon, the Court granted defendant an appeal in said cause to the Supreme Court of the State of Missouri.

Inasmuch as the foregoing evidence, proceeding, matters, things, rulings and exceptions do not appear of record, and in order that the same may be made a part of the record in this cause, so as to be presented to said appellate court, defendant here now presents to the Court this, his bill of exceptions, and prays that the same may be settled and allowed, approved, signed and filed and ordered made a part of the record in this cause; all of which is accordingly done on this 26th day of September, 1921.

BENJ. J. KLENE,
Judge of the Circuit Court of the City of St. Louis, Division No. 6.

O. K.
September 17th, 1921.
SIDNEY THORNE ABLE,
Attorney for Plaintiff.

Within the time allowed by law, defendant duly filed in this court a certified copy of the judgment and order granting an appeal, and upon said transcript and the record as hereinbefore set forth, the cause is now pending for hearing in this court.

JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Appellant.

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Bill of exceptions:

Plaintiff's Evidence.

195 Defendant's Evidence.

197 And on the same day, to-wit, the 8th day of December, 1921, the said appellant filed his assignment of errors in said cause, which said assignment of errors is in the words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1921 (January Call, 1922).

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant.

Appeal from the Circuit Court of the City of St. Louis, Mo.

Honorable Benjamin J. Klene, Judge.

Assignment of Errors.

The defendant assigns the following errors:

I.

The instruction in the nature of a demurrer to the evidence should have been given.

198 II.

Under the Act of Congress known as the Safety Appliance Act, the defendant was only required to provide and maintain the grab-iron for the safety of men engaged in coupling and uncoupling cars. He owed the plaintiff no duty with respect thereto.

III.

Instruction number one was so verbose as to confuse the jury, and it was error to give it.

IV.

This instruction was also erroneous in inviting the jury to find that the fireman knew of the alleged perilous situation of the plaintiff when there was no evidence tending to prove that fact.

V.

It was also erroneous in permitting the jury to find that the failure to obey the plaintiff's alleged stop signal contributed to his fall when there was no evidence of that fact.

VI.

This instruction was also erroneous in permitting the jury to find that the jerk of the cars was so severe as to constitute negligence when there was no evidence tending to show that it was other than the usual jerking and bumping in stopping and starting a freight train.

VII.

This instruction was also erroneous in permitting the jury to convict the defendant of negligence for failure to repair the
199 grabiron, for the reason that under the Federal Safety Appliance Act the defendant owed the plaintiff no duty with respect thereto.

VIII.

This instruction was also erroneous in permitting the jury to convict the defendant of negligence for failure to repair the grabiron, for the reason that, having in mind the use for which the appliance was required and furnished, the defendant could not reasonably anticipate injury from a failure to repair.

IX.

This instruction was also erroneous in permitting the jury to convict the defendant of negligence for failure to repair the grabiron, for the reason that the defendant had not had the car a sufficient length of time to be chargeable with notice of the defect.

X.

The physical facts prove that the defect in the grabiron did not contribute to the plaintiff's accident.

XI.

The plaintiff was guilty of contributory negligence as a matter of law; his recovery is full compensation, as though he was not negligent, in violation of the provisions of the Act of Congress of April 22, 1908, Sec. 3, U. S. Compiled Statutes 1918, Section 8659 in the Federal Employers' Liability Act. The damages assessed are, therefore, excessive.

JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Defendant.

200 And thereafter, on the 13th day of January, 1922, the following proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1921.

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, etc., Appellant.

Come now the said parties, by their attorneys, and after argument herein, submit this cause to the Court.

And thereafter, on the 14th day of March, 1922, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1921.

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, etc., Appellant.

Now at this day, a majority of the Judges not concurring in the opinion herein, the Court doth order that said cause be, and the same is hereby, transferred to the Court in Banc.

201 And thereafter, on the 2nd day of May, 1922, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, in Banc, April Term, 1922.

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, etc., Appellant.

Come now the said parties, by attorneys, and after argument herein, submit this cause to the Court.

And thereafter, and on the 1st day of June, 1922, the following further proceedings were had and entered of record in said cause, to-wit:

202 In the Supreme Court of Missouri, in Banc, April Term, 1922.

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, etc., Appellant.

Now at this day, upon the stipulation of the parties heretofore filed herein, it is ordered by the Court that James C. Davis, Director General of Railroads, the present designated agent provided for in section 206 of the Transportation Act of 1920, be substituted as appellant herein.

And on the same day, to-wit, the 1st day of June, 1922, the following further proceedings were had and entered of record in said cause, to-wit:

LEE A. WOLFE, Respondent,

vs.

JAMES C. DAVIS, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be affirmed conditionally.

It is further ordered by the Court that the said judgment of the said Circuit Court of the City of St. Louis be modified by substituting James C. Davis, Director General of Railroads, as defendant therein. (Opinion filed.)

Which said opinion, filed in said cause, is in the words and figures following, to-wit:

203 In the Supreme Court of Missouri, in Banc, April Term, 1922.

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant.

I.

Appeal from the Circuit Court of the City of St. Louis. Personal injury suit.

Plaintiff's evidence tended to show that on March 14th, 1918, he was a conductor on the Chicago & Eastern Illinois Railroad, then in control and being operated by the Government under the Federal Control Act, and lost his left arm by being run over by a car in the freight train of which he was conductor. That while the train was at Bourbon Station, Illinois, moving slowly, he was standing on the west side of a car with his feet in the sill step or stirrup close to the north end of the car and his right hand holding on to the hand hold or grab iron. The said sill step was fastened to the bottom of the car within a foot or thereabouts of the north end and directly over it, about three or four feet, was the hand hold or grab iron, a round iron bar about twenty inches long, bent at the ends which were bolted into the wooden side of the car. But the wood had rotted or been worn away so that the bolts had a play or movement of
204 about an inch or more which made the grab iron loose and defective and permitted it to move to that extent. While thus holding on to the grab iron with his right hand and standing in this step, plaintiff signaled the fireman with his left hand to stop the train, but instead of stopping, the train moved forward with a violent jerk at accelerated speed, and by reason of the movement of the loose grab iron to which plaintiff was holding, he was caused to fall to the ground beside the car and one of the wheels ran over his left arm and injured it so that it had to be amputated at the shoulder joint. Plaintiff's evidence further tended to show that it was not unusual for conductors or brakemen to stand in the step and hold on to the grab iron to signal orders as to the movement of the train.

The defendant's evidence tended to show a contrary state of facts and that plaintiff was injured in attempting to exchange papers with the station agent while hanging and leaning out from the ladder on the side of the car near its south end while the same was in motion in passing said station and slipped and fell under the car in so doing. The car was an interstate car and was being used in interstate commerce. As to this there was no dispute. Nor was there any dispute as to the worn condition of the wood around the hand hold and the

loose condition of the bolts therein which permitted the grab iron or hand hold to have a movement or play of about an inch.

The petition, which is long, in substance, alleged as to the cause of the accident, first, that the grab iron was defective and insufficient and not securely and safely attached to the side of the said car; that the grab iron, the bolt and other apparatus used to attach the grab iron to the car and the car at the point of attachment were then and there old, worn, loose, unstable, wobbly and rickety and dangerous and unsafe to work about and had been in that condition for some time before the accident as defendant knew or might have known by due care, in time to remedy same prior to plaintiff's injury, but negligently failed to do so or warn plaintiff with reference to same and that by reason of defendant's negligence and "the defects and insufficiencies" which were due to defendant's negligence, plaintiff
205 was injured.

Second, that while plaintiff was so riding upon the side of the car and holding to said grab iron and the train was moving slowly, plaintiff gave the usual signal to the persons in charge of the engine to stop, but they negligently failed to look out and discover said signal, or if they saw it, they negligently failed to obey it, but negligently started said train forward without warning plaintiff, knowing, or by the exercise of due care might have known that plaintiff was in a place of danger of being thrown off by such action and thereby precipitated the plaintiff to the ground whereby he was injured as before stated.

The third specification is in substance the same as the first, except it also alleged the car was being used in interstate commerce, and the grab iron and attachments were not securely fastened as required by the Safety Appliance Act of the United States and the orders of the Interstate Commerce Commission, but old, worn, loose, dangerous and unsafe and in a condition in violation of the said Safety Appliance Act, etc., whereby plaintiff was thrown off and injured.

The fourth specification is substantially the same as the second, with the additional allegation that the train was started forward with a violent and extraordinary jerk at accelerated speed, and by reason of the movement of the loose grab iron to which plaintiff was holding, he was caused to fall to the ground beside the car and one of the wheels ran over his left arm and injured it so that it had to be amputated a few hours afterwards at the shoulder joint.

The petition then alleges that by reason all "the aforesaid mentioned matters, singly and collectively, he was thrown from the side of the car and beneath the wheels of one of the cars in said train and one of said wheels ran over plaintiff's arm" etc.

"Wherefore plaintiff states that he has been damaged in the sum of $65,000.00, for which, with costs, he prays judgment."

206 The answer put the allegations of the petition in issue, also pleaded contributory negligence and assumption of risk. Reply was a general denial.

The court refused a demurrer to evidence asked by defendant, gave nine instructions for defendant, four on its own motion and one for the plaintiff. The plaintiff's instruction was as follows:

"The Court instructs the jury that if you find and believe from the evidence that the plaintiff was injured on or about the 14th day of March, 1918, in Bourbon, Illinois, and if you further find and believe from the evidence that at the time he was injured he was the conductor of freight train number 160, and if you further find and believe from the evidence that at such time freight train number 160 was moving northwardly on the northbound main track of the Chicago & Eastern Illinois Railroad Company, and if you further find and believe from the evidence that there was a car initialed B. & L. E. and numbered 80993 in train number 160 at the time which contained corn shipped from Arthur, Illinois, and which was at the time en route to Terre Haute, Indiana (if you so find), and if you further find and believe from the evidence that the plaintiff, Lee A. Wolfe, was at the time riding on the side of the said car initialed B. & L. E. and numbered 80993, holding to a grab iron on the west side near the north end of the aforesaid car in the aforementioned train, if you find that it was in said train, and if you further find and believe from the evidence that at the time the train was moving at a slow rate of speed, and if you further find and believe from the evidence that the plaintiff, Lee A. Wolfe, gave a stop signal in the performance of his duties as the conductor upon the train, if you so find, to those operating and in charge of the movement of the said engine, and if you further find and believe from the evidence that the fireman was in the cab of the engine on the west side of the train, and if you further find and believe from the evidence that the fireman was looking back toward the plaintiff, and if you further find and believe from the evidence that it was the duty of the fireman to exercise ordinary care to discover, transmit and pass a signal to the engineer, if a signal was given by the
207 plaintiff, and if you further find and believe from the evidence that it was then the duty of the engineer to act upon such signal, if such signal was repeated to him by the fireman, and if you further find and believe from the evidence that the fireman knew that the plaintiff was on the side of the said train and in a position where he would be in danger of being thrown off the train by the sudden increase of the speed of the said train without warning to the plaintiff that the speed was to be increased, and if you further find and believe from the evidence that in the exercise of ordinary care it was the duty of the fireman to exercise ordinary care to look out for signals given by the plaintiff, and if you further find and believe from the evidence that just prior to the time plaintiff was injured, if you find that he was injured, plaintiff gave a stop signal and if you find and believe from the evidence that the fireman either saw the stop signal given by the plaintiff or that if he did not see it that had he exercised ordinary care he could have seen the stop signal, if you find that there was a stop signal given by the plaintiff at the time, and if you further find and believe from the

evidence that while plaintiff was giving the stop signal the train slackened up to a slower speed, and if you further find and believe from the evidence that the plaintiff continued to give the stop signal, and if you further find and believe from the evidence that while the said stop signal was being given by the plaintiff those in the engine and in charge thereof gave the engine steam and caused the train to start suddenly forward at an increased rate of speed, if you so find, and if you further find and believe from the evidence that in the exercise of ordinary care those in charge of and operating the engine should not have caused the train to start forward, but should have brought the train to a stop, and if you further find and believe from the evidence that no warning was given to the plaintiff that the train was about to start forward at an increased rate of speed, and if you further find and believe from the evidence that such a movement at such a place under the conditions as they existed there at the time was unusual and unnecessary in the movement then being made, and if you further find and believe from the
208 evidence that the sudden starting forward of the train without any signal from the plaintiff so to do while the plaintiff was giving a stop signal (if you find and believe from the evidence that the train was suddenly started forward without any signal from the plaintiff and while the plaintiff was giving a stop signal), contributed to cause the plaintiff to fall from the side of said car and his left arm to be run over and cut off, if you find that the plaintiff did fall from the side of said car and his left arm was run over and cut off, and if you further find and believe from the evidence that at the time the plaintiff was exercising ordinary care for his own safety, and if you further find and believe from the evidence that at the time the grab iron to which the plaintiff was holding, if you find that the plaintiff was holding to a grab iron, was not securely fastened to the side of the car and that there was some play or movement in this grab iron, and if you further find and believe from the evidence that the north end of the aforesaid grab iron was attached to the car by means of a bolt which ran through the wooden part of the car out through the end of the grab iron, and if you further find and believe from the evidence that the hole in the wooden part of the car through which this bolt passed had been enlarged by a wearing away of the portion of the wood around the hole, and if you further find and believe from the evidence that this permitted some play or movement in the north end of the grab iron, and if you further find and believe from the evidence that this grab iron had been in this condition for some time prior thereto, and if you further find and believe from the evidence that the grab iron in this condition was dangerous and not reasonably safe for the use of the men working upon and about the said train, and if you further find and believe from the evidence that the defendant or its inspectors could by the exercise of ordinary care have discovered the condition of this grab iron, if you find that the grab iron was in this condition, in time by the exercise of ordinary care to have remedied it, and that they failed and neglected to exercise ordinary care to remedy it, and if you further find and believe from the evi-

dence that the grab iron gave or moved while the plaintiff was holding to it, if you find that plaintiff was holding to it, and
209 that such movement in the grab iron contributed to cause the plaintiff to fall from the side of the said car and to be run over and his left arm cut off, if you find that he did fall from the side of the said car and that he was run over and that his left arm was cut off, and if you further find and believe from the evidence that at the time he received his injuries, if you find that he did receive injuries, and prior thereto the plaintiff was in the exercise of ordinary care for his own safety, and that the plaintiff was not guilty of any negligence that contributed to cause his injuries, then your verdict should be for the plaintiff and against the defendant, and if you find for the plaintiff in this event, under all the evidence in the case, in estimating and determining the measure of his damages, if any, the jury may take into consideration in connection with all the facts and circumstances in evidence the character and extent of the plaintiff's injuries, if any, you find and believe from the evidence he received and whether such injuries, if any, are permanent in their nature, and may find for him such sum as in the judgment of the jury, under all the evidence in the case, will fairly and reasonably compensate him for the injuries you find and believe from the evidence he received, if any, and the Court further instructs you that if you find as above, except that you find and believe from the evidence that at the time the plaintiff was injured, if you find that he was injured, he was not in the exercise of ordinary care and that the plaintiff was at the time guilty of negligence contributing to cause his injuries, if any, then in that event your verdict should be for the plaintiff and against the defendant, but in that event the damages, if any, shall be diminished by you in proportion to the amount of negligence attributable to the plaintiff."

The jury rendered a verdict for the plaintiff for $15,000.00. Defendant duly appealed to this court.

II.

Section 8608 (Compl. Stats. U. S. 1918), as follows:

"8608. Grab Irons or Handholds.—From and after the first day of July, eighteen hundred and ninety-five, until otherwise
210 ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. (March 2, 1893, c. 196, sec. 4, 27 Stat. 531.)"

Section 8618 required all such cars "to be equipped with secure sill steps."

It is contended by learned counsel for Appellant that inasmuch as said Section 8608 required said secure grab iron or handhold only "for greater security to men in coupling and uncoupling cars," and

plaintiff was not so engaged when injured, he has no cause of action under said Safety Appliance Act. In support of the proposition, Appellant cites St. Louis & San Francisco Railroad Company v. Conarty, 238 U. S. 248. That case is distinguished in Louisville & Nashville Railroad Company v. Layton, 243 U. S. l. c. 620, and the doctrine clearly announced there that the benefit of the statute is not restricted to employees while coupling or uncoupling cars, but extends to all employees while injured in using such defective appliances in the discharge of their duties. The same rule was applied in a later case of Minne. & St. Louis Railroad Company v. Gotschall, 244 U. S. 66. See also Director General v. Ronald, 265 Fed. 138. So that we rule this point against the Appellant.

III.

(*a*) The plaintiff's case coming under the said Safety Appliance Act, it was sufficient that plaintiff prove the existence of the defective grab iron and that it was in part the cause of plaintiff's injury. It was not necessary to prove negligece on the part of the carrier in maintaining said grab iron in a secure condition,—its duty to do so was imperative and absolute. St. Louis & Iron Mountain Railroad Company v. Taylor 210 U. S. 281; Great Northern Railroad Company v. Otos, 239 U. S. l. c. 351; Chicago Burlington & Quincy Railroad Company v. United States, 220 U. S. 211 559. Louisville & Nashville Railroad Company v. Layton, 243 U. S. l. c. 619; Callicotte v. Railroad 274 Mo. 689.

(*b*) So also plaintiff's contributory negligence, if any there was, is not only no defense to a cause of action arising under the Safety Appliance Act, but is not even to be taken into consideration in reducing the damages he may recover. The Employer's Liability Act (Sec. 3, 35 U. S. Stat. 65-66), provides: "Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee." The statute, in such cases, "abolishes the defense of contributory negligence not only as a bar to recovery, but for all purposes." Grand Trunk Railroad Company, v. Lindsay, 233 U. S. l. c. 49-50. Callicotte v. Railroad, 274 Mo. 689.

In our opinion the petition and evidence of plaintiff were sufficient to take the case to the jury under the Federal Safety Appliance Act and Employers' Liability Act and therefore neither defendant's negligence nor plaintiff's contributory negligence were germane as to the controversy. This has been so ruled by this Court. Callicotte v. Railroad, 274 Mo. 689.

IV.

The loose condition of the grab iron and that the car was being used in interstate commerce, being undisputed, the only question in the case relating to defendant's liability is whether that condition

was a contributory cause of the plaintiff's injury. We think plaintiff's evidence tended to show that it was and the plaintiff's instruction fairly presented that question to the jury. There are other matters of negligence such as "sudden jerk" caused by failure to obey plaintiff's signal to stop and negligent failure to repair the grab iron submitted in plaintiff's instruction but no recovery by plaintiff is authorized on account thereof unless the jury further believe from the evidence that the grab iron was defective and contributed to plaintiff's injury.

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V.

The fact that plaintiff's instruction required the jury to find the defendant guilty of all the specifications of negligence alleged in the petition, when it was only necessary for him to prove the defective grab iron and the consequent injury therefrom does not involve an error of which Appellant can complain. Nor does the fact, if it be a fact, which we need not decide, that there was no substantial evidence to sustain such superfluous and unnecessary matters, such as negligence in inspection and repairing the grab iron, or in the "sudden jerk" of the train does not vitiate such instruction. This Court has expressly so decided. Callicotte v. Chicago Rock Island & Pacific Railroad Company, 274 Mo. 689.

VI.

The Appellant complains vigorously of the length of the instruction given for the plaintiff. The instruction is of great length but it embraces matter which would usually be contained in at least three instructions, one as to liability of defendant, one as to the measure of damages, and one as to the diminution of damages in case plaintiff was guilty of contributory negligence. This last section of the instruction was for the defendant's benefit as it was entitled to no diminution of damages on account of contributory negligence on plaintiff's part. The length of the instruction is, no doubt attrbutable to the unnecessary burdens plaintiff assumed in regard to other acts or specifications of negligence alleged in the petition besides violating the Safety Appliance Act as to the insecure grab iron, all of which were matters of which defendant has no cause of complaint because in its favor. While plaintiff's instruction was long it was clearly written and the attentive eye or ear would have no difficulty in following it. Its mere length, while objectionable, does not constitute reversible error, Crowl v. American Linseed Oil Co., 255 Mo. 305; Andrew v. Linebaugh, 260 Mo. 651; Weller v. Railroad, 164 Mo. 180. Two cases are relied on by Appellant as holding the contrary, but we think those cases are distinguishable from the case before us. In Williams v. Ransom, 234 Mo. l. c. 66 this Court held it was not error to refuse in-

213 structions on account of their length and verboseness and so framed that no average jury could follow the train of thought contained therein, even though their theory was correct. But in

that case the court, of its own motion, gave a correct instruction and other instructions which fairly presented the case. The court said, l. c. 71-72: "Upon the main issue the instruction given fairly presented the case and it becomes unnecessary to undertage to analyze the verbose instruction asked by plaintiff." In Stid v. Railroad, 236 Mo. 398, verboseness in instructions was disapproved but the instruction there condemned also conflicted with a proper instruction given for the opposite party.

In the case before us nine instructions were given for defendant, presenting its theory very clearly. Number III told the jury the plaintiff could not recover if plaintiff was injured while exchanging papers with the station agent by slipping off the ladder on the rear end of the car, notwithstanding there may have been a loose grab iron on the front end of the car. Number VI that the jury must find for defendant unless plaintiff established by a preponderence of the evidence that he was riding on the north end of the car and that his fall "was caused by a loose grab iron" or by negligent handling of the train. Number VII, that if the jury were unable to determine whether plaintiff's injury was the result of a loose grab iron or a sudden jerk of the train or due to other causes, the verdict must be for defendant.

Plaintiff's instruction was more favorable to defendant than defendant's own instructions, in that it did not authorize a recovery for plaintiff simply by reason of a sudden jerk or negligent handling of the train, as assumed in defendant's instructions, but in addition thereto, before the jury could find for plaintiff under plaintiff's instruction, the jury were also required to further believe from the evidence that the grab iron was loose and defective and contributed to cause the plaintiff's injury.

We do not consider plaintiff's instruction, owing merely to its length—there being no error in it in other respects—in any way would mislead or confuse the jury to defendant's detriment.

214 VII.

As to the amount of the verdict: The Appellant says: "The plaintiff was guilty of contributory negligence as a matter of law; his recovery is full compensation as though he was not negligent, in violation of the Act of Congress. The damages are therefore excessive." Inasmuch as plintiff's contributory negligence, if any, was not an element or factor in the case, we must rule this point too, against Appellant. It being stipulated by the parties that James C. Davis, Director General of Railroads, the present designated agent provided for in section 206 of the Transportation Act of 1920 and successor of John Barton Payne in such office, may be substituted as Appellant in this cause, accordingly, said James C. Davis is so substituted. The judgment of the lower court is therefore modified by substituting said James C. Davis, Director General of Railroads,

as defendant therein and as so modified, finding no error in the proceedings below, the judgment of the Circuit Court is affirmed.

CHARLES E. SMALL,
Commissioner.

Brown, C., absent.
Ragland, C., concurs.

En Banc.

Per Curiam:

The foregoing opinion by Small, C., is adopted as the opinion of the court, except that it is ordered that if respondent will remit $2,500.00 the judgment will be affirmed for $12,500.00 as of the date of the verdict; otherwise, the judgment will be reversed and the cause remanded. James T. Blair, C. J., and Higbee Elder and Walker, JJ., concur; Woodson, J., thinks the judgment should be reduced to $10,000.00, but concurs in other respects; Graves, J., dissents in a separate opinion, in which David E. Blair, J., concurs.

215 In the Supreme Court of Missouri, April Term, 1922, in Banc.

No. 22771.

LEE A. WOLFE, Respondent,

vs.

JOHN BARTON PAYNE, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant.

Dissenting Opinion.

I dissented in Division for the reason that the principal instruction for the plaintiff was of such length, that no average jury could carry the thought supposed to be in the instruction. I think that there are substantial errors in this instruction leaving out of consideration its length. However its length has been sufficiently condemned by this Court, and I go no further. I doubt whether or not there is liability, but this I will not discuss, as the length of this instruction condemns the trial nisi. Williams vs. Ransom, 234 M. l. c. 66; Stid vs. Railroad 236 M. 398; Crowell vs. American Linseed Oil Co. 255 M. 331; Andrew vs. Linebaugh 260 M. 651; Heman vs. Hartman, 189 M. 241; Sidway vs. Live Stock Co. 163 M. 376.

Think of five printed pages for an instruction in an ordinary damage suit. It shocks the experience of both bench and bar. No jury can carry the real thread of such an instruction, if it can be said that it has a thread. For this reason, if not for others, I dissent. D. E. Blair, J., concurs in these views.

W. W. GRAVES, *J.*

216 And thereafter, on the 3rd day of June, 1922, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, in Banc, April Term, 1922.

LEE A. WOLFE, Respondent,

vs.

JAMES C. DAVIS, Director General of Railroads, the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant.

Now at this day, comes the said respondent, in person and by attorney, and hereby enters a remittitur herein in the sum of two thousand five hundred dollars ($2,500.00), part and parcel of the judgment heretofore entered in this cause in the Circuit Court of the City of St. Louis, in compliance with the order heretofore made by this Court on the 1st day of June, 1922. It is therefore considered and adjudged by the Court that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered on the 17th day of November, 1920, be affirmed, and stand in full force and effect, for the sum of twelve thousand five hundred dollars ($12,500.00), with interest thereon from November 17th, 1920, at the rate of six per cent per annum; and that the said appellant recover against the said respondent his costs and charges herein expended and have therefor execution.

217 STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause entitled Lee A. Wolfe, Respondent, vs. James C. Davis, Director General of Railroads, the designated Agent provided for in Section 206 of the Transportation Act of 1920, Appellant, No. 22771, as fully as the same appear of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 16th day of June, 1922.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court
of the State of Missouri.

218 *Index.*

219 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, Director General of Railroads, the Designated Agent provided for in Section 206 of the Transportation Act of 1920, is appellant, and Lee A. Wolfe is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of the City of St. Louis, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command

220 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

221 [Endorsed:] File No. 29,018. Supreme Court of the United States, October Term, 1922. No. 468. James C. Davis, Designated Agent, etc., vs. Lee A. Wolfe. Writ of certiorari.

222 UNITED STATES OF AMERICA,
State of Missouri, ss:

In obedience to the command of the within writ of certiorari, and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the tran-

script of the record filed with the petition for writ of certiorari in the case of James C. Davis, Director General of Railroads and the designated agent provided for in Section 206 of the Transportation Act of 1920, Appellant, vs. Lee A. Wolfe, Respondent, No. 22,771, is a full, true and complete transcript of all of the pleadings, proceedings and record entries in said cause, as mentioned in the certificate thereto.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of the State of Missouri, at office in the City of Jefferson, Missouri, this 1st day of November, 1922.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court
of the State of Missouri.

223 In the Supreme Court of Missouri.

No. 22771.

JAMES C. DAVIS, Director General of Railroads and the Designated Agent Provided for in Section 206 of the Transportation Act of 1920, Appellant,

vs.

LEE A. WOLFE, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the certified transcript of the record prepared by the Clerk of the Supreme Court of Missouri and filed with the petition for a writ of certiorari, and now on file in the office of the Clerk of the Supreme Court of the United States, shall stand as a return of said Clerk of the Supreme Court of Missouri to the writ of certiorari, without the preparation of another transcript, and, to this end, it shall only be necessary for said
224 Clerk to transmit to the Clerk of the United States Supreme Court a certified copy of this stipulation as his return to the writ of certiorari.

THOMAS P. LITTLEPAGE,
JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
RALPH T. FINLEY,
Attorneys for Appellant.
SIDNEY THORNE ABLE,
CHARLES P. NOELL,
Attorneys for Respondent.

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a true and complete copy of the stipulation of the parties as to the return to be made to the writ of certiorari in the case of James C. Davis, Director General of Railroads and the designated agent provided for in Section 206 of the Transportation Act of 1920, Appellant, vs. Lee A. Wolfe, Respondent, No. 29,018, as fully and completely as said stipulation remains on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri, at my office in the City of Jefferson, this 1st day of November, 1922.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court
of the State of Missouri.

225 [Endorsed:] 468—29,018.

226 [Endorsed:] File No. 29,018. Supreme Court U. S., October Term, 1922. Term No. 468. James C. Davis, Designated Agent, etc., Petitioner, vs. Lee A. Wolfe. Writ of certiorari and return. Filed Nov. 6, 1922.

No. 18871

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. DAVIS, Designated Agent Under the Transportation Act,
Petitioner,
vs.
LEE A. WOLFE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSOURI, BRIEF IN SUPPORT OF SAME, AND NOTICE OF SUBMISSION.

THOS. P. LITTLEPAGE,
JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
RALPH T. FINLEY,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

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List of Cases Cited in Brief.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. DAVIS, Designated Agent Under the Transportation Act,

Petitioner,

vs.

LEE A. WOLFE,

Respondent.

NOTICE OF PETITION FOR WRIT OF CERTIORARI.

To Lee A. Wolfe, Respondent, and Sidney Thorne Able and Chas. P. Noell, His Attorneys of Record:

Take Notice, that on Monday, the 2nd day of October, 1922, at the opening hour of the Supreme Court of the United States, or as soon thereafter as counsel can be heard, the petitioner above named will present to the Supreme Court of the United States at Washington, D. C., a petition for writ of certiorari to

be directed to the Supreme Court of the State of Missouri, in the cause entitled in that court as "Lee A. Wolfe, respondent, v. John Barton Payne, Director General, etc., appellant." A copy of such petition and the brief in support thereof is herewith furnished you.

June ....., 1922.

THOS. P. LITTLEPAGE,
JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
RALPH T. FINLEY,
Counsel for Petitioner.

We acknowledge service of the above and foregoing notice, with a copy of the petition and the brief in support thereof.

June 28., 1922.

(Signed) Sidney Thomas Asle
(Signed) ..... Chas. P. Noell ....
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. DAVIS, Designated Agent Under the Transportation Act,
Petitioner,

vs.

LEE A. WOLFE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James C. Davis, designated agent under the Transportation Act, and as such successor to John Barton Payne, former Director General and Designated Agent under the Transportation Act, and

substituted appellant in the Supreme Court of Missouri in the above-entitled cause, presents this his petition for a writ of certiorari to be directed to the Supreme Court of the State of Missouri in the cause above entitled, and for cause therefor respectfully represents:

The respondent, Lee A. Wolfe, brought the above-entitled action on March 15, 1920, in the Circuit Court of the City of St. Louis, State of Missouri, against John Barton Payne, designated agent under the Transportation Act, seeking to recover damages for personal injuries suffered by him while in the employ of the Director General as conductor of a freight train operated by the Director General on the Chicago & Eastern Illinois Railroad, in the State of Illinois (Rec., p. 4).

On a trial of the cause in that court, the plaintiff recovered judgment, on the verdict of a jury, for fifteen thousand dollars ($15,000.00) (Rec., p. 2). The defendant therein appealed the cause to the Supreme Court of the State of Missouri, where it was first heard in a division of that court (Rec., pp. 1, 200). The petitioner here, James C. Davis, having succeeded the original defendant, John Barton Payne, as Designated Agent under the Transportation Act, was, by stipulation of the parties, and the order of the Supreme Court of Missouri thereon, substituted as defendant in the cause, and as appellant therein in that

court (Rec., p. 202). The title of the cause in that court remained as previously, however, to wit: Lee A. Wolfe, Respondent, v. John Barton Payne, Appellant, No. 22,771.

The cause was afterwards transferred from this division of the Supreme Court of Missouri to the Court *en Banc,* and heard there (Rec., pp. 200, 201).

The Court en banc adopted the opinion previously filed in division and on June 1, 1922, affirmed the judgment of the Circuit Court, on condition, however, that the respondent remit twenty-five hundred dollars ($2500.00) of his recovery in the court below (Rec., p. 202). Respondent made such a remittitur (Rec., p. 216); whereupon, on June 3rd, 1922, the Supreme court of Missouri en banc affirmed the judgment of the Circuit Court in the cause for a recovery of twelve thousand five hundred dollars ($12,500.00) instead of fifteen thousand dollars ($15,000.00), the original judgment below (Rec., p. 216).

The facts in the controversy, so far as here pertinent or necessary to be stated, were as follows:

Wolfe, the plaintiff in the controversy, and respondent here, was conductor on a local freight train which ran between Villa Grove and Pana, stations in Illinois along the line of the Chicago & Eastern Illinois Railroad (Rec., pp. 64-66-112). On March 14, 1918, the day of his accident, Wolfe's train, in charge of himself as conductor, with a crew consisting of an

engineer, a fireman and two brakemen, was proceeding from Pana northwardly to Villa Grove. At a station called Arthur, they put in the train five or six loaded cars received at that point, among which was Bessemer & Lake Erie No. 80993, loaded with grain and consigned to Terre Haute, Indiana (Rec., pp. 66, 67, 49). The train now consisted of an engine and a caboose and eleven freight cars (Rec., p. 72). The north or forward end of this B. & L. E. car, as it was placed in the train, was equipped on the west side with a stirrup or step suspended below the frame of the car, with a grab iron or handhold a few feet above it, bolted to the body of the car. This equipment was installed in compliance with Section 8608, U. S. Comp. Stat. 1918, Safety Appliance Act of March 2, 1893, for the purpose of affording (to quote the language of the Act), "*greater security to men in coupling and uncoupling cars.*" Being thus designed for use in coupling and uncoupling cars in doing which a man must lean over, the grab iron was placed so near the step or stirrup that a man could not stand upright on the stirrup and support himself by the use of the grab iron. In order to hold to the grab iron while standing on the step, he must need stand in a more or less crouching or folded-up position (Rec., p. 32). On the south or rear end of this car, and on the same side, was a similar stirrup or step, above which on the side

of the car was a ladder contrivance with numerous rungs, cross pieces or handholds bolted to the body of the car and leading to the roof (Rec., p. 82).

At page 60 of the record your Honors will find a fair picture of the west side of the car with the equipment thereon indicated above.

After the plaintiff and his crew had put these cars, received at Arthur, into the train, they proceeded northward a few miles to the next station, called Bourbon (Rec., p. 66). Arrived at Bourbon, the engine stopped a few car lengths south of the station to take water. While it was so engaged, Mr. Wolfe, the plaintiff, got out of the caboose and walked up the west side of the train, toward the north, alongside the cars, making a record of the various seals of the cars which he had picked up at Arthur (Rec., pp. 66, 67). Presently, the train again moved forward towards the station. As this B. & L. E. car passed him, Wolfe says he swung on to this stirrup at the north end of the car holding on to the grab iron above it in order to ride up to the station (Rec., p. 67). It was mid-afternoon, raining and the ground was muddy. The train was moving about four or five miles an hour, or about as fast as a man could walk rapidly (Rec., p. 67). Presently Wolfe fell from this step and was injured by the train.

On examination of the car it was found that the equipment at the south end of the car, on the west

side, was in perfect condition, as was the stirrup at the north end, on that side (Rec., pp. 170, 173, 174). The grab iron or handhold at the north end of the car was bolted at each end to the car. It was about two feet long (Rec., p. 63). The wood which held the bolt at the north end of this grab iron had become worn, and there was a resultant play of about one inch in the handhold. The witnesses differed about the nature of this play; some of them said it was outward from the car, others said it was downward (Rec., pp. 54, 57, 125, 166, 167). Wolfe testified that there was some kind of a movement of this grab iron which precipitated him to the ground and under the wheels of the car.

These facts, with some elaboration which we have regarded as necessary to a proper presentation of the case, will be found stated by the Supreme Court of Missouri in its opinion on the case (Rec., p. 203).

It was the contention of the petitioner, before the Supreme Court of the State, that Section 4 of the Act of March 2, 1893, known as the Safety Appliance Act, was without application under the facts in this case because the plaintiff, at the time of his injury, was not engaged in coupling or uncoupling cars, nor, indeed, was he employed by the Director General for such purpose; and the appliances required by this Act are, by the terms of the Act, required only for the security of men engaged in coupling and uncoupling

cars. The State Court denied this contention, and held that the plaintiff, although at the time using the appliance only as a means of, or aid to transportation, was, nevertheless, within the protection of the Act, and entitled to recover for its violation.

Having this view, it was ruled that the duty of the Director General to the respondent to provide the appliance and keep it in order was absolute and that the respondent, therefore, need show no negligence on the part of the Director General in the matter of inspection and repair of the appliance. And it was further ruled, based on this interpretation of the Act, that since the plaintiff's cause of action was based on a violation of Section 4 of the Safety Appliance Act, his recovery could not be reduced by his own contributory negligence because of the provisions of the Employers' Liability Act—it being the contention of the petitioner in the State Court that the respondent had been guilty of contributory negligence in riding in such a position without necessity, when he might have chosen a more secure position on the other end of the same car, or one still more secure on his own caboose, with no loss of time or inconvenience.

We, therefore, on this application, assign the following errors in the opinion, rulings and judgment of the State Court, all of which are, of course, based

on that which we believe to be a misinterpretation and misapplication of Section 4 of the Safety Appliance Act:

I.

The State Supreme Court erred in holding that the Director General owed this respondent the duty prescribed by Section 4 of the Safety Appliance Act to provide and maintain, in a condition of safety, a handhold or grab iron on the car in question, for the use of the respondent in riding on the car from one point to another, and entirely disconnected with the coupling or uncoupling of cars.

II.

The State Supreme Court erred in holding that, under the terms of Section 4 of the Safety Appliance Act, the Director General rested under an absolute duty to the respondent to keep the grab iron or handhold on the car in order and repair for use by respondent in riding on the car from one point to another, entirely disconnected with any coupling or uncoupling of cars, and that because this was true the respondent was not obligated to prove on the part of the Director General any negligence in the matter of the inspection or repair of the grab iron in order to be permitted to recover.

III.

The State Supreme Court erred in holding that under the terms of Section 4 of the Safety Appliance Act, the Director General rested under an absolute duty to the respondent to keep the grab iron or handhold in question in order and repair while in use by the respondent in riding on the car from one point to another, entirely disconnected with any coupling or uncoupling of cars, and that, therefore, and because of the terms of the Employers' Liability Act, the damages occasioned to the respondent by his injuries from a violation of the statute could not be reduced by his own contributory negligence in riding where he did and as he did, instead of seeking a more secure place to ride at the other end of the car, or a still more secure place upon his own caboose in the same train, either of which he might have done without inconvenience to himself or detriment to his duties.

Wherefore, the petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, requiring and directing the said Supreme Court of the State of Missouri, by and upon a date certain to be designated therein, to certify and send to this Court a full, true and complete transcript of the record and proceedings in said Supreme Court of the State of Missouri, in the case there heretofore pending, entitled Lee A. Wolfe, Re-

spondent v. John Barton Payne, Director General of Railroads and Designated Agent, Appellant, and numbered 22,771 upon the docket of said court; to the end that said cause may be reviewed and determined by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the said Supreme Court of the State of Missouri in said cause may be reversed.

Thos. P. Littlepage,
James C. Jones,
Lon O. Hocker,
Frank H. Sullivan,
Ralph T. Finley,

Attorneys for Petitioner.

State of Missouri, }
City of St. Louis. } ss.

Frank H. Sullivan, being duly sworn, upon his oath says that he is one of the counsel for the petitioner herein; that he prepared the foregoing petition, and that the statements therein contained are true, as he verily believes.

Frank H. Sullivan.

Subscribed and sworn to before me this the 26th day of June, 1922.

My commission expires October 5, 1923.

Mary A. Angert,
(Seal) Notary Public, City of St. Louis, Missouri.

June 8, 1922.
3-J.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The questions here arising under Section 4 of the Safety Appliance Act, and the manner of their disposition by the Missouri Supreme Court, are made apparent by the following, which we quote from the opinion of that Court (Rec., p. 209):

"II.

"Section 8608 (Compl. Stats. U. S. 1918), as follows:

"'8608. *Grab Irons or Handholds.*—From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars (March 2, 1893, c. 196, sec. 4, 27 Stat. 531).'

"Section 8618 required all such cars 'to be equipped with secure sill steps.'

"It is contended by learned counsel for appellant that inasmuch as said section 8608 required said secure grab iron or handhold only 'for greater security to men in coupling and uncoupling cars,' and plaintiff was not so engaged when injured, he has no cause of action under said Safety Appliance Act. In support of the proposition, appellant cites St. Louis & San

Francisco Railroad Company v. Conarty, 238 U. S. 248. That case is distinguished in Louisville & Nashville Railroad Company v. Dayton, 243 U. S., l. c. 620, and the doctrine clearly announced there that the benefit of the statute is not restricted to employes while coupling or uncoupling cars, but extends to all employes while injured in using such defective appliances in the discharge of their duties. The same rule was applied in a later case of Minne. & St. Louis Railroad Company v. Gotschall, 244 U. S. 66. (See, also, Director General v. Ronald, 265 Fed. 138.) So that we rule this point against the appellant.

"III.

"(a) The plaintiff's case coming under the said Safety Appliance Act, it was sufficient that plaintiff prove the existence of the defective grab iron and that it was in part the cause of plaintiff's injury. It was not necessary to prove negligence on the part of the carrier in maintaining said grab iron in a secure condition; its duty to do so was imperative and absolute (St. Louis & Iron Mountain Railroad Company v. Taylor, 210 U. S. 281; Great Northern Railroad Company v. Otos, 239 U. S., l. c. 351; Chicago, Burlington & Quincy Railroad Company v. United States, 220 U. S. 559; Louisville & Nashville Railroad Company v. Layton, 243 U. S., l. c. 619; Callicotte v. Railroad, 274 Mo. 689).

"(b) So, also, plaintiff's contributory negligence, if any there was, is not only no defense to a cause of action arising under the Safety Ap-

pliance Act, but is not even to be taken into consideration in reducing the damages he may recover. The Employer's Liability Act (Sec. 3, 35 U. S. Stat. 65-66), provides: 'Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of the employes contributed to the injury or death of such employe.' The statute, in such cases, 'abolishes the defense of contributory negligence not only as a bar to recovery, but for all purposes' (Grand Trunk Railroad Company v. Lindsay, 233 U. S., l. c. 49-50; Callicotte v. Railroad, 274 Mo. 689).

"In our opinion the petition and evidence of plaintiff were sufficient to take the case to the jury under the Federal Safety Appliance Act and Employer's Liability Act, and, therefore, neither defendant's negligence nor plaintiff's contributory negligence was germane as to the controversy."

It does not there appear exactly what respondent was engaged in at the time of his injury, other than the fact that he was not engaged in coupling or uncoupling cars. As stated in the petition for the writ, however, there is no dispute of the fact that he had gotten upon this stirrup, and was supporting himself by means of the grab iron, for the purpose of riding from the vicinity of the water tank to the station, at the time he fell and suffered injury.

Concretely stated, the question is whether Section 4 of the Safety Appliance Act requires the furnishing and maintenance of this grabiron or handhold as a means of, or aid to transportation, in behalf of an employe of the carrier not engaged in coupling or uncoupling cars, or any service connected therewith.

Both the language of the section and the context of the act as a whole point to the conclusion that the state court has misinterpreted the design of Congress in the enactment of the statute. Thus section 2 of the act provides that automatic couplers must be provided, coupling by impact, and so constructed that men need not go between the cars to uncouple (27 St. at Large 531); while by section 3 the carrier is authorized to refuse to receive from a connecting carrier cars not so equipped (27 St. at Large 531). Notwithstanding these required precautions, it was evidently in the mind of Congress that these automatic devices might not always function as intended. In consequence of which it was provided by section 4 (27 St. at Large 531) that cars should also be equipped with grabirons or handholds in the ends and sides *"for greater security to men in coupling and uncoupling cars,"* evidently in those instances where the automatic devices might fail to function, and hand work become necessary. It is manifest that the prescribed grabiron was required for a restricted as well as a limited use.

As has been stated, there is no dispute as to the fact that the respondent had gotten upon the stirrup and was holding to this handhold for no other purpose than that of riding the train from the water tank to the station. No necessity of the service put him in that position. He might have ridden the other end of the car with much more security; he might have ridden the caboose with no risk at all.

We have no concern here with the common-law duties of the Director General or the respondent.

We are concerned only with the applicability of the Act of Congress, upon which the Missouri court entirely rested its judgment.

Both the express language, as well as the plain purpose of section 4, excludes the notion that this grab iron was required as a means of, or aid to the transportation of an employe whose duties had no connection with coupling and uncoupling cars.

We think this question is settled adversely to the views promulgated by the Missouri court, by the opinion of this Court in St. Louis & San Francisco Railroad Co. v. Conarty, 238 U. S. 248. That case had to do with the automatic coupler required by the second section of the act. The plaintiff was a brakeman, and, therefore, when performing some of his duties, he was one of the persons within the purview of the act. The automatic coupler there involved was out of repair. *But the injured party in that case was not en-*

gaged in coupling cars. He was riding on a switch engine, which was brought in collision with a freight car, and his injuries were due to the fact that the automatic coupler on the freight car was out of repair. Notwithstanding this, it was held that section 2 of the act was without application.

We quote these remarks of Mr. Justice Van Devanter, writing the opinion of the Supreme Court of the United States in that case (238 U. S. 249 *et seq.*):

> "The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in the injury to the deceased. It, therefore, is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for *where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable* (The Eugene F. Moran, 212 U. S. 466, 476; Gorris v. Scott, L. R. 9 Ex. 125; Ward

v. Hobbs, L. R. 4 App. Cas. 13, 23; Williams v. Chicago & Alton R. R., 135 Illinois 491, 498; O'Donnell v. Providence & Worcester R. R., 6 R. I, 211; Metallic Compression Co. v. Fitchburg R. R., 109 Mass. 277, 280; Favor v. Boston & Lowell R. R., 114 Mass. 350; East Tennessee R. R. v. Feathers, 78 Tenn. 103; Pollock on Torts, 8th Ed., 28, 198).

"The Safety Appliance Acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled 'without the necessity of men going between the ends of the cars, or that is not equipped with drawbars of standard height—the height of the drawbar having, as explained in Southern Ry. v. Crockett, 234 U. S. 725, 735, an important bearing on the safety of the processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are directed are those which intended the old-fashioned link and pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars, when coupled into a train, sometimes separated by reason of the insecurity of the coupling. In Johnson v. Southern Pacific Co., 196 U. S. 1, 19, this court said of the provision for automatic couplers that 'The risk in coupling and uncoupling was the evil sought to be remedied;' and in Southern Ry. v. Crockett, 234 U. S. 725, 737, it was said to be the plain purpose of the two provi-

sions that 'where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars (27 Stat. 531).'

"*We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation were the absence of the prescribed coupler and drawbar operated as a breach of the duty imposed for his benefit*, and that the Supreme Court of the state erred in concluding that the Safety Appliance Acts required it to hold otherwise."

The Conarty case was considered in Lang v. New York Central etc. Railway Co., 255 U. S. 460, where Mr. Justice McKenna, writing the opinion of the Court, said, respecting the views of the New York Court of Appeals, this:

> "The court's conclusion that the requirement of the Safety Appliance Act 'was intended to provide against the risk of coupling' cars, is the explicit declaration of the *Conarty case.*"

Lang's case was cited to the Missouri court, but not noticed by that court in its opinion.

There is nothing in either Louisville etc. Ry. Co. v. Layton, 243 U. S. 620, or Minneapolis etc. Railway Co. v. Gotschall, 244 U. S. 66, relied on by the State Supreme Court, to support the views expressed by that Court. Rightly understood, none of these decisions of this Court are in conflict. They all arose under the Second Section of the Safety Appliance Act, and concerned the automatic couplers there required. Conarty was injured in a collision. If the automatic coupler had been in order his injury would not have occurred. In other words, the coupler failed to function *for another purpose* than that of making the coupling. It was held that there could be no recovery under the act.

In Layton's case the employe was riding on top of a car in order to release the brakes, when a coupling had been made. The coupler was out of order, failed to work, and Layton, in consequence, was thrown from the car and injured. He was held within the act. In other words, an employe, in the line of his duty, and required to station himself where he did, was injured by reason of the fact that an appliance required by the act *failed to perform the function for which it was required.* Gotschall's case evoked the same principle, he having been thrown from the top of a car by reason of the failure of the coupler to function properly.

Lang was on top of a car in a train for the purpose of setting the brake and prevent its coming in contact with a car standing on the track, the coupler of which was broken. He failed to prevent the contact, and, because the broken coupler failed to work, was thrown from the train. He was held not within the act, manifestly because no coupling was in process at the time.

The facts in *Layton's* and *Gotschall's* cases are so widely at variance with the facts in this case as that they are not controlling here. In each of those cases an appliance failed to perform the very function it was designed and required by the act to perform (i. e., to automatically couple cars), and the failure directly caused injury to an employe who was occupying a position where his duty required him to be. In this case, on the other hand, an appliance, designed and required solely as an aid to the safety of employes *in coupling and uncoupling cars,* failed to function safely (so it is said) *as a means of transportation,* and injured an employe not required by any duty to the defendant to be where he was, and whose position, among numerous permissible ones less dangerous, was one entirely of his own choosing. The only resemblance that this case bars to those is that in each a railway employe suffered an injury.

It is respectfully submitted that the opinion of the Missouri Supreme Court is in error; that the writ prayed for ought to be allowed and the judgment of that court reversed and for naught held.

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Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

JAMES C. DAVIS, Designated Agent Under the Transportation Act,
Petitioner,

vs.

LEE A. WOLFE,
Respondent.

No. [redacted]71

STATEMENT AND BRIEF FOR RESPONDENT.

SIDNEY THORNE ABLE,
CHARLES P. NOELL,
WALTER L. BRADY,
For Respondent.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

JAMES C. DAVIS, Designated Agent Under the Transportation Act, Petitioner, vs. LEE A. WOLFE, Respondent.	No. 468.

STATEMENT AND BRIEF FOR RESPONDENT.

STATEMENT.

This case comes here by reason of certiorari directed to the Supreme Court of the State of Missouri to review its judgment and opinion rendered en banc.

The suit is under the Federal Employers' Liability Act and the Federal Safety Appliance Act for per-

sonal injuries sustained by respondent (plaintiff below) while employed by petitioner in its interstate commerce.

The facts, as proved by respondent, and, as the jury, in the first instance, apparently found them, are stated in the opinion of the Missouri Supreme Court (Rec., p. 136) as follows:

> "Plaintiff's evidence tended to show that on March 14th, 1918, he was a conductor on the Chicago & Eastern Illinois Railroad, then in control and being operated by the Government under the Federal Control Act, and lost his left arm by being run over by a car in the freight train of which he was conductor. That while the train was at Bourbon Station, Illinois, moving slowly, he was standing on the west side of a car with his feet in the sill step or stirrup, close to the north end of the car, and his right hand holding on to the handhold or grab iron. The said sill step was fastened to the bottom of the car within a foot or thereabouts of the north end and directly over it, about three or four feet, was the handhold or grab iron, a round iron bar about twenty inches long, bent at the ends, which were bolted into the wooden side of the car. But the wood had rotted or been worn away so that the bolts had a play or movement of about an inch or more, which made the grab iron loose and defective and permitted it to move to that extent. While thus holding on to the grab iron with his right hand and standing in this step, plaintiff

signaled the fireman with his left hand to stop the train, but instead of stopping the train moved forward with a violent jerk at accelerated speed, and by reason of the movement of the loose grab iron to which plaintiff was holding, he was caused to fall to the ground beside the car and one of the wheels ran over his left arm and injured it so that it had to be amputated at the shoulder joint. *Plaintiff's evidence further tended to show that it was not unusual for conductors or brakemen to stand in the step and hold on to the grab iron to signal orders as to the movement of the train.*"

We italicize the last-quoted sentence to demonstrate the error in a statement in petitioner's brief (p. 14) that "no necessity of service put him there."

It was undisputed that respondent was engaged in interstate commerce and that the grab iron, from which he fell to his injury, was loose and defective. Petitioner fairly describes the condition of the grab iron in its brief (p. 6) in these words:

> "The wood which held the bolt at the north end of this grab iron had become worn, and there was a resultant play of about one inch in the handhold."

These facts conceded, viz., the interstate character of respondent's employment and the defective condition of the grab iron, petitioner yet contended that re-

spondent was not entitled to the protection of the Safety Appliance Act because he was not engaged in coupling or uncoupling cars at the time of falling from the defective appliance. The Supreme Court of Missouri disposed of this contention (Rec., p. 140, et seq.) in the following language:

> "It is contended by learned counsel for appellant that inasmuch as said section 8608 required said secure grab iron or handhold only 'for greater security to men in coupling and uncoupling cars,' and plaintiff was not so engaged when injured, he has no cause of action under said Safety Appliance Act. In support of the proposition, appellant cites St. Louis & San Francisco Railroad Company v. Conarty, 238 U. S. 248. That case is distinguished in Louisville & Nashville Railroad Company v. Layton, 243 U. S., l. c. 620, and the doctrine clearly announced there that the benefit of the statute is not restricted to employes while coupling or uncoupling cars, but extends to all employes while injured in using such defective appliances in the discharge of their duties. The same rule was applied in a later case of Minne. & St. Louis Railroad Company v. Gotschall, 244 U. S. 66. See also Director General v. Ronald, 265 Fed. 138. So that we rule this point against the appellant."

With this view of the facts, the Court affirmed the

judgment in favor of the respondent with the following observation (Rec., p. 141 et seq.):

> "The loose condition of the grab iron and that the car was being used in interstate commerce being undisputed, the only question in the case relating to defendant's liability is whether that condition was a contributory cause of the plaintiff's injury. We think plaintiff's evidence tended to show that it was, and the plaintiff's instruction fairly presented that question to the jury."

Upholding the judgment on this ground, the state court found it unnecessary to consider other negligence alleged in the petition, which was proved and submitted to the jury by proper instruction, **and sufficient in itself to warrant affirmance of the judgment in favor of respondent.**

Then followed the writ of certiorari, petitioner focusing its attack on that portion of the opinion of the Missouri Supreme Court, quoted above, which holds respondent within the protection of the Safety Appliance Act under the circumstances of his case.

Logically treated, therefore, petitioner's contention is not that the judgment should not have been affirmed, but that the Missouri court stated erroneous grounds for its affirmance.

POINTS AND AUTHORITIES.

I.

Respondent, injured as a direct and proximate result of a loose and defective grab iron, while using such grab iron in a usual and customary manner in the discharge of his duties in interstate commerce, was within the protection of the Safety Appliance Act, although not actually engaged in coupling and uncoupling cars at the time the grab iron gave way and pitched him to his injury, and the opinion of the Supreme Court of Missouri is not erroneous in so holding.

Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931;

Minneapolis & St. Louis R. Co. v. Gotshall, 244 U. S. 66, 37 Sup. Ct. R. 598;

St. Louis & San Francisco R. Co. v. Conarty, 238 U. S. 243, 59 L. Ed. 1290;

Lang v. New York Central R. Co., 255 U. S. 455, 41 Sup. Ct. R. 381;

Director General of Railroads v. Ronald, 265 Fed. 138;

Philadelphia & R. Ry. Co. v. Eisenhardt, 280 Fed. 271;

Ewing v. Coal and Coke Ry. Co. (W. Va.), 96 S. E. 73, certiorari denied 247 U. S. 521, 38 Sup. Ct. 583, 62 L. Ed. 1246.

ARGUMENT.

The highest court of Missouri, assembled en banc, was unanimous in deciding the issue here made against the petitioner.

Wolfe, working in the night in interstate commerce, had lost his left arm as a direct and proximate result of a loose and defective grab iron. These facts were undisputed. It was undisputed, too, that he was performing his duty while holding the grab iron in question, but here the way divides, petitioner claiming that he must needs be coupling or uncoupling cars to complain of the injury so resulting, when, in fact, he was giving signals while standing in the stirrup and holding to the grab iron, a practice quite usual and customary for conductors and brakemen. Petitioner's brief persistently refers to his using the grab iron as "a means of or aid to transportation," thus creating the impression that he was performing no duty while in that position, but an examination of the facts, quoted supra from the opinion of the Missouri Supreme Court, quickly dissipates such impression.

Petitioner, contending for such restricted and narrow construction of the Appliance Act, there, as here, placed its reliance in St. Louis and San Francisco Railroad Company v. Conarty, 238 U. S. 248, and

Lang v. New York Central Railway Company, 255 U. S. 455. It, therefore, becomes necessary, to a proper application of those two cases, to analyze the facts upon which this Court was then called to pass judgment.

In the former case, Conarty, at the time of receiving injuries which resulted in his death, was standing on the footboard at the front of a switch engine which collided in the nighttime with a freight car having no coupler or drawbar. This car had been left for the moment by another crew on the track on which Conarty's engine was approaching. It was dark and the headlight of another engine operated to obscure its presence until too late to avoid a collision. Neither Conarty, nor any of the members of his crew, had observed the car prior to the collision, and there was no intention on their part of making a coupling with it. The only negligence charged was failure to have the car equipped, at the end struck by the engine, with an automatic coupler and drawbar. It was conceded that the lack of such coupler and drawbar was not the proximate cause of the collision. As stated in the opinion (l. c. 249):

> **"It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions."**

It was contended, however, that had these appliances been in place sufficient clearance might have been left between the colliding engine and car to enable Conarty to escape serious injury, despite the collision. To this contention the Court replied (l. c. 250):

> "Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. * * * We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car, **or to handle it in any way**, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit."

Obviously, the only question in Conarty's case was proximate cause and equally obvious was the conclusion reached. Indeed, it would not be more remote to contend that an employe receiving a bullet wound, while riding in Conarty's position, was entitled to the protection of a coupler and drawbar on the theory that such appliances might have intercepted the bullet.

Note the words in the Conarty opinion, that he was not endeavoring to use the defective appliance, **"or to handle it in any way."**

Respondent Wolfe **was** handling and using the defective appliance in discharge of his duty; Conarty **was not.** Nothing in the Conarty opinion is in any manner inconsistent with the opinion of the Missouri court in the case at bar.

The facts in the Lang case were very similar to those in the Conarty case. Lang, a brakeman, was riding at the end of a car that was being pushed toward another car having no coupler or bumper. Lang knew of the presence of this car on the track and knew that it was defective in the manner stated. It was his duty to set the brake on the car on which he was riding at some point prior to reaching the defective car, but, for reasons unknown, he neglected to do so. A collision, resulting in his death, followed. As in the Conarty case, absence of the coupler attachments brought the cars closer together than would otherwise have been the case, and thus crushed Lang to death. Absence of these appliances, however, was not the cause of the collision. And so, the case was decided on the same principle applied in Conarty's case.

It will be seen, therefore, in both the Conarty and Lang cases, that the defective appliances complained of were held to be the remote and not the immediate and proximate cause of the collisions there involved. This issue, and this alone, was decisive of those cases, and nothing in the opinion in either case,

properly read, tends to sustain petitioner's contention here.

It is conceded in the case at bar that the defective condition of the grab iron was the proximate and only cause of the accident and respondent's resulting injury. For this reason, as we view the situation, there is no analogy between these cases on which petitioner relies and the case under consideration.

The foregoing discussion covers all that petitioner has advanced in support of its contention herein. The Supreme Court of Missouri gave due consideration to petitioner's claim that the Conarty case precluded a recovery in the case at bar and was of the opinion (Rec., p. 141) that the **Conarty case "is distinguished in Louisville & Nashville Railroad Company v. Layton, 243 U. S., l. c. 620, and the doctrine clearly announced there that the benefit of the statute is not restricted to employes while coupling or uncoupling cars, but extends to all employes while injured in using such defective appliances in the discharge of their duties."**

In the Layton case the defective appliance was found to be the proximate cause of the injury. Layton was injured while at work on top of a car due to the carrier's failure to equip it with automatic couplers. This Court said:

> "While it is undoubtedly true that the immediate occasion for passing the laws requiring au-

tomatic couplers was the great number of deaths and injuries caused to employes who were obliged to go between cars to couple and uncouple them, yet these laws, as written, are by no means confined in their terms to the protection of employes only when so engaged. **The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employe may be in, or the work which he may be doing at the moment when he is injured.** This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the **proximate cause of injury to them when engaged in the discharge of duty.**''

The Layton case was cited and discussed in the case of Director General of Railroads v. Ronald, 265 Fed. 138, and the Ronald case was cited by the Missouri court in its opinion holding against the petitioner herein. Ronald, at the time of receiving his injury, was in the act of dropping from the platform of the caboose car as the train approached a water plug. His right hand was holding to a vertical grab iron on the side of the car, when his weight pulled out the lower end of the grab iron and he was thrown from

his place on the side of the car. It will be seen that he was neither coupling nor uncoupling cars at the time and had no intention of so doing. The Court said (l. c. 140):

> "The Federal Employers' Liability Act, exclusively regulating the relation of common carriers and their employes while engaged in interstate commerce, was enacted long after the Safety Appliance Act, viz., April 22, 1908 (35 Stat. 65), and this absolute duty of the railroad company under the Safety Appliance Act to its employes, injured when engaged in interstate commerce, must be considered as incorporated in it. **Whenever a violation of that act is the proximate cause of the injury, the negligence of the railroad company is ipso facto established.**"

A concurring opinion by Justice Manton (l. c. 143), again using the Layton case as authority, said:

> "The legislation was clearly for the safety of employes. Coupling and uncoupling cars is, indeed, but one of the many acts that require the boarding and alighting from cars, and in light of the automatic coupling requirements statute, the need to board and alight from cars solely for the purpose of coupling or uncoupling cars is greatly diminished. The Supreme Court has placed no such construction upon these statutes when it has had occasion in the past to refer to them.

> "In Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, the Court held that the purpose of the Safety Appliance Act was to promote the safety of employes, and ruled that it was unlawful for any carrier engaged in interstate commerce to use on its railroad cars not so equipped (Southern R. Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed 72)."

In Minneapolis & St. Louis Railroad Company v. Gotschall, 244 U. S. 66, the Court held that although Gotschall was not engaged in coupling or uncoupling cars, but was walking along the top of the cars when the couplers separated, causing him to be thrown off and killed, that his administrator could nevertheless recover under the Safety Appliance Act because violation of the act was the proximate cause of his injury.

The Lang case, supra (one of the two on which petitioner relies), recognizes the force of the Layton case, but distinguishes it on the question of proximate cause. The Court said (l. c. 458):

> "It is insisted upon, however, and to what is considered its determination is added a citation from the Layton case declaring that the Safety Appliance Act makes 'it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not' equipped as there provided, and, further, 'by this legislation the qual-

ified duty of the common carrier is expanded into an absolute duty in respect to car couplers,' and by an omission of the duty the carrier incurs 'a liability to make compensation to any employe who' is 'injured by it.' **But necessarily there must be a causal relation between the fact of delinquency and the fact of injury, and so the case declares.** Its concluding words are, expressing the condition of liability, **'that carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.''**

An interesting discussion of the Lang, Conarty, Layton and Gotschall cases is found in Philadelphia and R. Railway Company v. Eisenhart, 280 Fed. 271. There the Court found nothing of inconsistency in the principles announced in the four cases. It distinguished all on the principle of causal relation. The following is from the opinion of that court (pp. 272 to 275):

"The cars of a freight train were being distributed to several tracks in the yards of the defendant at East Penn, Pennsylvania. Eisenhart, the conductor, was riding on a draft of two cars which had been cut from the train and kicked to a siding. His task was to stop them at their destination. While these cars were still in motion the train parted by reason of the opening of couplers and another draft of cars broke away

and, following down on the same track without a brakeman, collided with the car on which Eisenhart was riding, throwing him to the ground and causing him injury.

"Eisenhart brought this action, charging negligence to the defendant for violating both the Safety Appliance Act and the rule of common law. Safety Appliance Act, § 2, 27 Stat. 531, and amendments (Comp. St. § 8606). He had a verdict. The defendant sued out this writ of error.

"The case was tried mainly on the liability of the defendant for operating a car with a defective coupler in violation of the Safety Appliance Act, carrying, of course, the advantage to the plaintiff of relief from the law of assumption of risk and contributory negligence. The defendant maintains by this writ that under the evidence, as well as by a proper interpretation of several decisions of the Supreme Court construing the Safety Appliance Act, the plaintiff did not bring himself within the Act, and that, in consequence, his right to recover, if any, was on the counts charging negligence under the rule of common law with its burden of assumption of risk and contributory negligence, and that, accordingly, the trial court erred in submitting the case on the statute.

"Obviously, the plaintiff's injury was due to the uncoupling of the train at a place at which uncoupling was not intended and at which the plaintiff was not working. For evidence of negligence in support of the counts under the Safety Appliance Act the plaintiff relied upon the inference of a defective coupler, drawn from the fact

that the couplers uncoupled, and upon testimony to the effect that when examined after the accident the couplers showed lost motion between the lock and knuckle, enough to have caused the cars to part.

"Regarding as the test of compliance with the statute the equipping of cars 'with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,' the defendant introduced evidence to the effect that the couplers were of an accepted type and in good condition, and had, both before and after the accident, coupled and uncoupled in the way provided by the statute. Having complied with this statutory standard, the defendant maintains that nothing more was required of it; and that, as the plaintiff was not injured by reason of the couplers failing to meet this standard, but was injured some distance away by reason of a collision, the case comes within the decision of the Supreme Court in **Lang** v. New York Central R. R. Co., 255 U. S. 455, 41 Sup. Ct. 381, 65 L. Ed. 729, where it was said that the Safety Appliance Act 'was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of cars. It was not * * * to provide a place of safety between colliding cars,' quoting from S. L. & S. F. R. R. Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290. Reliance by the defendant upon its interpretation of the Lang decision compels a review of several decisions of the Su-

preme Court bearing on the Safety Appliance Act.

"The first is the **Conarty** case. In this case a car without a coupler or drawbar at one end was on a switch awaiting removal for repair. A switching engine with which the deceased was working came along the same track and a collision ensued. The deceased was standing on the footboard at the front of the engine and was caught between the engine and the body of the car. Had the coupler and drawbar been in place they would have kept the engine and the car sufficiently apart to have prevented the injury. They would not have prevented the collision.

"The question arose whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Act required that the car be equipped with automatic couplers and drawbars of standard height. Inquiring into the general purpose of the act and the evil it was intended to prevent, the Supreme Court alluded to the danger to men going between cars to couple and uncouple them and said that the principal purpose of the enactment of the statute was 'to obviate the necessity for men going between the ends of the cars.' It found that the deceased, 'who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit.' Holding that the plaintiff was not within the

class of persons for whose benefit the statute was enacted, the Court denied recovery. This decision was regarded, either rightly or wrongly, as an interpretation of the Act limiting its application, so far as automatic couplers are concerned, to those whose duty it is to couple and uncouple cars. In considering the effect of this decision upon later decisions and upon the case at bar it is pertinent to note that the Court very carefully pointed out that

" 'It is not claimed, nor could it be under the **evidence**, that the collision was **proximately** attributable to a violation of [the] provisions [of the Act] but only that had they been complied with it would not have resulted in injury to the deceased.'

"In Louisville & Nashville R. R. Co. v. **Layton**, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, the next case in order, an engine, pushing a car ahead of it, came into a switch and attempted to couple a draft of five cars. It struck the cars with such force that the couplers refused to couple automatically by impact and the whole draft was driven down the track and came into collision with a standing train with such violence that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track and injured. As the plaintiff did not sustain injury when coupling or uncoupling cars, **the defense was based on the claim** that it had been decided in the Conarty case **that the Safety Appliance Act is 'intended only for the benefit of employes injured when**

between cars for the purpose of **coupling or uncoupling them.' The Supreme Court, evidently desiring to dispel this view, said:**

"'While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employes who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employes only when so engaged. The language of the acts * * * makes it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employe may be in or the work which he may be doing at the moment when he is injured.'

"Again pointing out that in the Conarty case it was not claimed that the collision resulting in the injury was proximately attributable to a violation of the Safety Appliance Act, **the Court laid down a rule—from which it has not departed—that**

"'Carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.'

"The Court sustained the judgment on the finding that the failure of the couplers automatically to couple by impact was the proximate cause of the collision and resultant injury.

"Later came Minneapolis & St. Louis Railroad Co. v. **Gotschall**, 244 U. S. 66, 37 Sup. Ct. 598,

61 L. Ed. 995, a case in which a train parted because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes on the detached draft upon which Gotschall was riding and a sudden jerk which threw him off the train under the wheels—facts singularly similar to those of the case at bar. While the case went off on another question, the Court sustained the judgment for the plaintiff **consistently with its former pronouncement that whenever the failure to obey the safety appliance laws is the proximate cause of the injury, the carrier is liable.**

"Such was the law until **Lang** v. New York Central R. R. Co., supra. In this case a car without a drawbar or coupler was standing on a siding. The decedent was a brakeman riding on a draft of cars kicked toward the crippled car. He knew the condition of the car. A collision occurred and the decedent was crushed between the car upon which he was riding and the standing car. It was not intended that he should couple his draft with the defective car, but that he should stop his draft before it reached the car. For some reason he failed to do so and collision followed. Recovery was not allowed.

"The plaintiff in error regards the law of the Lang case as a reversal to the law of the Conarty case, not as explained in the Layton case, but as it was first popularly understood. This position is taken, doubtless, because the Court cited and affirmed the Conarty case. But the Court also affirmed the Layton case, **restating with empha-**

sis the rule of proximate cause which, being invoked in the Layton case, distinguished that case from the Conarty case, saying:

" 'But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and so the case declares, * * * carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.'

"The Court held in the Lang case, as in the Conarty case, that 'the collision was not the proximate result of the defect' in the safety appliance, or, stated differently, 'that the collision under the evidence cannot be attributed to a violation of the provisions of the law, "but only that had they been complied with, it [the collision] would not have resulted in injury to the deceased.' " The judgment for the defendant was sustained.

"[1.] **We cannot agree with the plaintiff in error in its contention that the Supreme Court, in the Lang case, construed the Safety Appliance Act** as restricting the liability of carriers to equipping cars with couplers of the standard required and **as limiting its protection to employes in the act of** or at the place of **coupling and uncoupling cars.** Whatever difference there may be in the opinions, the three cases cited, as also the Gotschall case inferentially, were tried and decided on the principle of causal relation between the fact of delinquency and the fact of injury, that is, **they were, with entire consistency, tried**

on the question whether on the facts of each case the carrier's failure to obey the statute was or was not the proximate cause of injury to the employe, without regard to the place and character of his work. This is the test of liability.

"Returning to the case at bar, we find that the learned trial judge submitted the case on the question of proximate cause strictly in line with these decisions."

The principle announced in all of these cases is the same. It is only the facts that differ. In the Conarty and Lang cases the element of proximate cause was absent; in the Layton case that element was present. Such is the consensus of judicial opinion found everywhere.

The Supreme Court of Appeals of the State of West Virginia, in the case of Ewing v. Coal & Coke Railway Company, 96 Southeastern 73, had facts before it more analogous to those in the case at bar than in any decided case brought to our attention. There the plaintiff, a brakeman, owing to the darkness, failed to note the absence of a grab iron at the end of the car, and acting on the supposition that the car was equipped as required by the Safety Appliance Act, undertook to grasp the grab iron with his right hand, and, missing it, fell, to his injury. **He was neither coupling nor uncoupling cars at the time.** The defendant railroad company, in view of

this state of facts, raised exactly the same contention as petitioner raises in the case at bar. Replying to this contention, the Court said (l. c. 77):

> "But it is contended that the grab irons required by the Act of 1893, as amended in 1903, were 'for greater security to men in coupling and uncoupling cars,' and that their absence cannot be complained of by one not so engaged at the time of his injury. The case of Texas and Pacific Railway Company v. Rigsby, 241 U. S. 33, avoided the decision of that question by relying upon Section 2 of the Act of 1910, **but the later case of Louisville and Nashville Railroad Company v. Layton, 243 U. S. 617, lays down a rule sufficiently broad, we think, to protect the plaintiff in this case.**"

It is worthy of note, in passing, that the **Supreme Court of the United States (247 U. S. 521) denied a petition for certiorari to the West Virginia Court in the last cited case.**

The inevitable conclusion from the language of the act itself and the decisions construing it is that negligence under the act consists of the carrier's using the car in its defective condition. That negligence becomes actionable when it is the proximate cause of injury to one engaged in the discharge of duty. The argument that this beneficent legislation was intended as a protection to Wolfe while coupling (a

duty he might have been called upon to discharge at any time), but that such protection was withdrawn from him in the discharge of any other duty, falls with little force upon our humble judgment.

CONCLUSION.

The Conarty and Lang cases offer nothing to render petitioner's position tenable. They rest on the fundamental proposition that the defective safety appliance must be the proximate and not the remote cause of the injury complained of. These and the other decisions (reviewed supra) of this Court, the final arbiter in matters arising under this act of Congress, completely sustain the opinion rendered herein by the Supreme Court of Missouri en banc. The tendency of those decisions is not to restrict and narrow the meaning of this act, which had its origin in generous, humane and sympathetic motives—not to seek along the byways of technicality for means to withdraw its protection from one fairly within its scope—but to give it an interpretation and application that will nearest approach the humane purpose of Congress. Liability, according to the express language of the act, springs from use of the car not equipped as required, and this liability is complete when the element of proximate cause is present. What boots it, then, that Wolfe was not coupling

or uncoupling cars, but was using the defective grab iron in discharge of an equally essential duty? The carrier's duty to provide a secure grab iron was none the less absolute. Breach of that duty was the proximate cause of grave injury to him while in the discharge of duty in interstate commerce.

We respectfully submit that the opinion of the Supreme Court of Missouri is well considered and should not be subjected to any modification. The judgment should be affirmed.

Respectfully submitted,

SIDNEY THORNE ABLE,
CHARLES P. NOELL,
WALTER L. BRADY,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. DAVIS, Designated Agent Under the Transportation Act, Petitioner,

vs.

LEE A. WOLFE, Respondent.

No. 468.

STATEMENT AND BRIEF FOR PETITIONER.

This is a writ of *certiorari* to review an opinion and judgment of the Supreme Court of Missouri.

The history of the controversy is this:

The respondent Lee A. Wolfe brought the action in the Circuit Court of the City of St. Louis, State of Missouri, against John Barton Payne, designated agent under the Transportation Act, seeking to re-

cover damages for personal injuries suffered by him while in the employ of the Director General during the period of federal control as conductor of a freight train operated by the Director General on the Chicago & Eastern Illinois Railroad in the State of Illinois (Rec., pp. 41, 75).

Following a trial of the cause in that court, the plaintiff recovered judgment, on the verdict of a jury, for fifteen thousand dollars ($15,000.00) (Rec., p. 127). The defendant thereupon appealed the cause to the Supreme Court of the state, where it was first heard in a division of that court (Rec., p. 136). The petitioner here, James C. Davis, having succeeded the original defendant, John Barton Payne, as designated agent under the Transportation Act, was, by stipulation of the parties, and the order of the Supreme Court of Missouri thereon, substituted as defendant in the cause and as appellant therein in that court (Rec., p. 135). The title of the cause in that court remained as previously, however, to wit: Lee A. Wolfe, Respondent, v. John Barton Payne, Appellant, No. 22,771.

The cause was afterwards transferred from the division of the Supreme Court of Missouri to the Court en banc, and heard there (Rec., p. 144).

The Court en banc adopted the opinion previously filed in division; and on June 1, 1922, affirmed the

judgment of the Circuit Court, on condition, however, that the respondent remit twenty-five hundred dollars ($2500.00) of his recovery in the court below (Rec., p. 144). Respondent made such a remittitur (Rec., p. 145); whereupon, on June 3rd, 1922, the Supreme Court of the state en banc affirmed the judgment of the Circuit Court for a recovery of twelve thousand five hundred dollars ($12,500.00) instead of fifteen thousand dollars ($15,000.00), the original judgment below (Rec., p. 145).

The circumstances of respondent's accident were in dispute in the trial court, but stating them as he there contended, and as the jury apparently found them to have existed, they were as follows:

Mr. Wolfe was conductor on a local freight train which ran between Villa Grove and Pana, stations in Illinois along the line of the Chicago & Eastern Illinois Railroad (Rec., pp. 51, 75). On March 14, 1918, the day of his accident, Wolfe's train, in charge of himself as conductor, with a crew consisting of an engineer, a fireman and two brakemen, was proceeding from Pana northwardly to Villa Grove. At a station called Arthur they put in the train five or six loaded cars, received at that point, among which was Bessemer & Lake Erie No. 80993, loaded with grain and consigned to Terre Haute, Indiana (Rec., pp. 31, 52, 112). The train now consisted of an engine and a caboose and eleven freight cars (Rec., p. 47). The

north or forward end of this B. & L. E. car, as it was placed in the train, was equipped on the west side with a stirrup or step suspended below the frame of the car, with a grab iron or handhold a few feet above it, bolted to the body of the car. This equipment was installed in compliance with Section 4 of the Safety Appliance Act of March 2, 1893 (27 St. at Large, 531), for the purpose of affording (to quote the language of the act) "*greater security to men in coupling and uncoupling cars.*" Being thus designed for use in coupling and uncoupling cars in doing which a man must lean over to reach the coupling from his position on the stirrup, the grab iron was placed so near the step or stirrup that one could not stand upright on the stirrup and support himself by the use of the grab iron. In order to hold to the grab iron while standing on the step, he must needs stand in a crouching or *folded-up* position (Rec., pp. 22, 39). On the south or rear end of this car, and on the same side, was a similar stirrup or step, above which on the side of the car was a ladder contrivance with numerous rungs, cross pieces or handholds bolted to the body of the car and leading to the roof, by the use of which one could readily stand upright on the stirrup (Rec., p. 37).

The photograph of the west side of this car (the side on which respondent was riding), which was in evidence at the trial, is so imperfectly printed in the

record (Rec., p. 38) as to be of no service, so far as concerns visualizing the nature of its equipment. A much better copy may be found at Page 60 of the record submitted on the application for the writ of *certiorari* (*q. v.*).

After the plaintiff and his crew had put these cars, received at Arthur, into the train, they proceeded northward a few miles to the next station, called Bourbon (Rec., p. 43). Arrived at Bourbon, the engine stopped a few car lengths south of the station to take water. While it was so engaged Mr. Wolfe, the plaintiff, got out of the caboose and walked up the west side of the train, toward the north, alongside the cars, making a record of the various seals of the cars which he had picked up at Arthur (Rec., p. 43). Presently the train again moved forward towards the station. As this B. & L. E. car passed him, Wolfe says, he swung onto this stirrup at the north end of the car, holding onto the grab iron above it, in order to ride up to the station, and, of course, standing in a crouching position (Rec., p. 43). It was raining and the ground was muddy. The train was moving about four or five miles an hour (Rec., p. 44). Presently Wolfe fell from this step and was injured by the train.

On examination of the car it was found that the equipment at the south end of the car, on the west side, was in perfect condition, as was the stirrup at

the north end on that side (Rec., p. 116). The grab iron or handhold at the north end of the car was bolted at each end to the car. It was about two feet long (Rec., pp. 40, 23). The wood which held the bolt at the north end of this grab iron had become worn, and there was a resultant play of about one inch in the handhold. The witnesses differed about the nature of this play; some of them said it was outward from the car; others said it was downward (Rec., pp. 13, 23, 35, 37, 61, 85, 116). Wolfe testified that there was some kind of a movement of this grab iron which precipitated him to the ground and under the wheels of the car.

These facts, with some elaboration which we have regarded as necessary to a proper presentation of the case, will be found stated by the Supreme Court of Missouri in its opinion (Rec., p. 136, *et seq.*).

It was the contention of the petitioner, before the Supreme Court of the State, that Section 4 of the act of March 2, 1893, known as the Safety Appliance Act, was without application under the facts in this case because the plaintiff, at the time of his injury, was not engaged in coupling or uncoupling cars, nor, indeed, was he employed by the Director General for such purpose. The State Court denied this contention and held that the plaintiff, although at the time using the appliance only as a means of, or aid to, transportation, was, nevertheless, within the protec-

tion of the act and entitled to recover for its violation.

Having this view, it was ruled by that Court that the duty of the Director General to the respondent to provide the appliance and keep it in order was absolute, and that the respondent, therefore, need show no negligence on the part of the Director General in the matter of inspection and repair of the appliance. And it was further ruled, based on this interpretation of the act, that since the plaintiff's cause of action was based on a violation of Section 4 of the Safety Appliance Act, his recovery could not be reduced by his own contributory negligence because of the provisions of the Employers' Liability Act—it being the contention of the petitioner in the state court that the respondent had been guilty of contributory negligence in riding in such a position without necessity, when he might have chosen a more secure position on the other end of the same car, or one still more secure on his own caboose, with no loss of time or inconvenience.

Which leads to the following

Assignments of Error:

I.

The State Supreme Court erred in holding that the Director General owed this respondent the duty prescribed by Section 4 of the Safety Appliance Act to provide and maintain, in a condition of safety, a handhold or grab iron on the car in question, for the use of the respondent in riding on the car from one point to another, and entirely disconnected with the coupling or uncoupling of cars.

II.

The State Supreme Court erred in holding that, under the terms of Section 4 of the Safety Appliance Act, the Director General rested under an absolute duty to the respondent to keep the grab iron or handhold on the car in order and repair for use by respondent in riding on the car from one point to another, entirely disconnected with any coupling or uncoupling of cars, and that because this was true the respondent was not obligated to prove on the part of the Director General any negligence in the matter of the inspection or repair of the grab iron in order to be permitted to recover.

III.

The State Supreme Court erred in holding that under the terms of Section 4 of the Safety Appliance Act, the Director General rested under an absolute duty to the respondent to keep the grab iron or handhold in question in order and repair while in use by the respondent in riding on the car from one point to another, entirely disconnected with any coupling or uncoupling of cars, and that, therefore, and because of the terms of the Employers' Liability Act, the damages occasioned to the respondent by his injuries from a violation of the statute could not be reduced by his own contributory negligence in riding where he did and as he did, instead of seeking a more secure place to ride at the other end of the car, or a still more secure place upon his own caboose in the same train, either of which he might have done without inconvenience to himself or detriment to his duties.

BRIEF.

I.

The respondent, using the grab iron as an aid to transportation, was not within the Act of Congress, 27 St. at Large 531, Section 4, requiring the maintenance of the appliance only for the "greater security of men in coupling and uncoupling cars."

St. Louis & San Francisco Railway Co. v. Conarty, 238 U. S. 248;
Lang v. New York Central Railway Company, 255 U. S. 460;
Louisville etc. Railway Co. v. Layton, 243 U. S. 620 (distinguished);
Minneapolis etc. Railway Co. v. Gotschall, 244 U. S. 66 (distinguished).

II.

Upon principles of the common law, it was contributory negligence as a matter of law for the respondent to so use the appliance when safe methods of transportation were as equally available.

Moore v. Railway Co., 146 Mo. 582;
Hurst v. Railway Co., 163 Mo. 322;
George v. Railroad Co., 225 Mo. 402;
Brady v. Railway Co., 206 Mo. 530;
Railway Co. v. Jones, 95 U. S. 442.

ARGUMENT.

The Court of first instance submitted to the jury (Rec., p. 120) the question of the negligence of the Director General in the inspection and maintenance of this appliance; on appeal to the Supreme Court of the state the petitioner assigned as error that there was no evidence to justify a finding of neglect of duty in that respect or to justify submitting such an issue to the jury (Rec., pp. 132, 133).

It was also asserted (Rec., p. 133) that the respondent had been guilty of contributory negligence as a matter of law in using this appliance to transport himself when he might, with safety, have ridden the other end of the car, or the steps of his own caboose; and that his recovery, if one was had, should be reduced in consequence under the Employers' Liability Act of April 22, 1908. The assignments of error also submitted, in various ways, the proposition that, under the facts in this case, Section 4 of the Safety Appliance Act was without application (*Id.*)

On principles of the common law, unaffected by statute, respondent's choice of a dangerous method of transporting himself, as against two others which

were safe, is held to be negligence as a matter of law by the Missouri Court (Moore v. Railway Co., 146 Mo. 582; Hurst v. Railway Co., 163 Mo. 322; George v. Railroad Co., 225 Mo. 402; Brady v. Railroad Co., 206 Mo. 530). This upon the well-known and universal principle that where a choice of methods is available to the servant, one safe, the other dangerous—his choice of the latter is, as a matter of law, negligence (Railway Co. v. Jones, 95 U. S. 442).

The state court, by reason of its interpretation of the Safety Appliance Act, felt itself impelled to, and did, deny both these contentions of the petitioner, without consideration of their merits (Rec., p. 141, *et seq.*)

This is to say, the state court held that the petitioner was obligated to the respondent, by the terms of the Safety Appliance Act, to furnish and maintain this appliance; and hence it was ruled (*Id.*):

> *"The plaintiff's case coming under the said Safety Appliance Act, it was sufficient that plaintiff prove the existence of the defective grab iron and that it was in part the cause of plaintiff's injury. It was not necessary to prove negligence on the part of the carrier in maintaining said grab iron in a secure condition, its duty to do so was imperative and absolute."*

And so, also, as to the claim that respondent was guilty of contributory negligence, it was said (*Id.*):

> "So, also, plaintiff's *contributory negligence*, if any there was, is not only no defense to a cause of action arising under the Safety Appliance Act, but *is not even to be taken into consideration in reducing the damages he may recover.*"

From which the conclusion arrived at was (*Id.*):

> "In our opinion *the petition and evidence* of plaintiff *were sufficient* to take the case to the jury *under the Federal Safety Appliance Act and Employers' Liability Act*, and therefore *neither defendant's negligence nor plaintiff's contributory negligence were germane as to the controversy.*"

The federal question here, therefore, is whether the facts bring the respondent within the terms of the Safety Appliance Act.

Concretely stated, the question is whether Section 4 of the Safety Appliance Act requires the furnishing and maintenance of this grab iron or handhold *as a means of, or aid to transportation,* in behalf of an employe of the carrier not engaged in coupling or uncoupling cars, or any service connected therewith.

Both the language of the section and the context of the act as a whole point to the conclusion that the state court has misinterpreted the design of Congress in the enactment of the statute. Thus, section 2 of the act provides that automatic couplers must be provided, coupling by impact, and so constructed that men need not go between the cars to uncouple them (27 St. at Large 531); while by section 3 the carrier is authorized to refuse to receive from a connecting carrier cars not so equipped (27 St. at Large 531). Notwithstanding these required precautions, it was evidently in the minds of Congress that these automatic devices might not always function as intended. In consequence of which it was provided by section 4 (27 St. at Large 531) that cars should also be equipped with grab irons or handholds in the ends and sides "*for greater security to men in coupling and uncoupling cars,*" evidently in those instances where the automatic devices might fail to function and hand work become necessary. It is manifest that the prescribed grab iron was required for a restricted purpose and a limited use.

As has been stated, there is no dispute as to the fact that the respondent had gotten upon the stirrup and was holding to this handhold for no other purpose than that of riding the train from the water tank to the station. No necessity of the service put him in that position. He might have ridden the

other end of the same car with much more security; he might have ridden the caboose with no risk at all.

We have no concern here with the common-law duties of either the Director General or the respondent.

We are concerned only with the applicability of the act of Congress, upon which the Missouri court entirely rested its judgment.

Both the express language, as well as the plain purpose of section 4, excludes the notion that this grab iron was required by Congress *as a means of, or aid to, the transportation of an employe whose duties had no connection with coupling and uncoupling cars.*

We think this question is settled adversely to the views promulgated by the Missouri court, by the opinion of this Court in St. Louis & San Francisco Railroad Co. v. Conarty, 238 U. S. 248. That case had to do with the automatic coupler required by the second section of the act. The plaintiff was a brakeman, and, therefore, when performing some of his duties he was one of the persons within the purview of the act. The automatic coupler there involved was out of repair. *But the injured party in that case was not engaged in coupling cars.* He was riding on a switch engine, which was brought in collision with a freight car; and his injuries were due to the fact that the automatic coupler on the freight car was

out of repair—*i. e.*, if it had been in repair it would have prevented the injury which befell Conarty. Notwithstanding this, it was held that section 2 of the act was without application.

We quote these remarks of Mr. Justice Van Devanter, writing the opinion of the Court in that case (238 U. S. 249 *et seq.*)

> "The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in the injury to the deceased. It, therefore, is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for *where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable* (The Eugene F. Moran, 212 U. S. 466, 476; Gorris v. Scott, L. R. 9 Ex. 125; Ward v. Hobbs, L. R. 4 App. Cas. 13, 23; Williams v. Chicago & Alton R. R., 135 Illinois 491,

498; O'Donnell v. Providence & Worcester R. R., 6 R. I. 211; Metallic Compression Co. v. Fitchburg R. R., 109 Mass. 277, 280; Favor v. Boston & Lowell R. R., 114 Mass. 350; East Tennessee R. R. v. Feathers, 78 Tenn. 103; Pollock on Torts, 8th Ed. 28, 198).

"The Safety Appliance Acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled 'without the necessity of men going between the ends of the cars, or that is not equipped with drawbars of standard height—the height of the drawbar having, as explained in Southern Ry. v. Crockett, 234 U. S. 725, 735, an important bearing on the safety of the processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are directed are those which intended the old-fashioned link-and-pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars, when coupled into a train, sometimes separated by reason of the insecurity of the coupling. In Johnson v. Southern Pacific Co., 196 U. S. 1, 19, this Court said of the provisions for automatic couplers that 'The risk in coupling and uncoupling was the evil sought to be remedied'; and in Southern Ry. v. Crockett, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that 'where one vehicle is used in con-

nection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars (27 Stat. 531).'

"*We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of the duty imposed for his benefit*, and that the Supreme Court of the state erred in concluding that the Safety Appliance Acts required it to hold otherwise."

The Conarty case was considered in Lang v. New York Central Railway Co., 255 U. S. 460, where Mr. Justice McKenna, writing the opinion of the Court, said, respecting the views of the New York Court of Appeals, this:

"The court's conclusion, that the requirement of *the Safety Appliance Act 'was intended to provide against the risk of coupling' cars, is the explicit declaration of the Conarty case.*"

Lang's case, although cited to the Missouri Court with Conarty's case, was not noticed by that Court in its opinion.

It cannot be gainsaid that the principles declared in Conarty's case plainly exclude Wolfe from the purview of section 4 of the act.

There is nothing in either Louisville etc. Ry. Co. v. Layton, 243 U. S. 620, or Minneapolis etc. Railway Co. v. Gottschall, 244 U. S. 66, relied on by the State Supreme Court, to support the views expressed by that Court. Rightly understood, in the light of the facts in judgment, none of these decisions of this Court are in conflict. They all arose under the second section of the Safety Appliance Act, and concerned the automatic couplers there required. Conarty was injured in a collision. If the coupler had been in order his injury would not have occurred, but would have been prevented by the coupler. In other words, the coupler failed to function *for another purpose than that for which Congress required it to be maintained.* It was held that there could be no recovery under the act.

In Layton's case the employe was riding on top of a car in order to release the brakes, when a coupling should have been made. The coupler was out of order, failed to work, and Layton, in consequence, was thrown from the car and injured. He was held within the act. In other words, an employe, in the

line of his duty, and required to station himself where he did, was injured by reason of the fact that an appliance required by the act *failed to perform the function for which it was required*, to his hurt.

Gotschall's case evoked the same principle, he having been thrown from the top of a car by reason of the failure of the coupler to function properly.

Lang was on top of a car in a train for the purpose of setting the brake and preventing its coming in contact with a car standing on the track, the coupler of which was broken. He failed to prevent the contact, and because of the broken coupler, was thrown from the train. He was held not within the act, manifestly because no coupling was in process at the time.

The facts in *Layton's* and *Gotschall's* cases are so widely at variance with the facts in this case as that they are not controlling here. In each of those cases an appliance failed to perform the very function it was designed and required by the act to perform (*i. e.*, to automatically couple cars); and the failure directly caused injury to an employe who was occupying a position where his duty required him to be. In this case, on the other hand, an appliance, designed and required solely as an aid to the safety of employes *in coupling and uncoupling cars*, failed to function safely *as a means of transportation*, and injured an employe not required by any duty to the defendant to be

where he was, and whose position, among other permissible ones less dangerous, was one entirely of his own choosing. The only resemblance that this case bears to those is that in each a railway employe suffered an injury.

The judgment of the Supreme Court of Missouri is in error in the application of the Act of Congress, and it should therefore be reversed.

Respectfully submitted,

THOS. P. LITTLEPAGE,
FRANK H. SULLIVAN,
WILLIAM O. REEDER,
HOMER T. DICK,
For Petitioner.

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List of Cases Cited in Brief.

Proof of Service.

We acknowledge service of the within brief.

September 19., 1922. Thomas P. Littlepage
James C. Jones
Lon O. Hocker
Frank N. Sullivan
Ralph S. Hinkley
} Signed

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. DAVIS, Designated Agent Under the Transportation Act, Petitioner,

vs.

LEE A. WOLFE, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The facts in the case are as follows (Rec., pp. 203 to 205), (quoting from opinion of Missouri Supreme Court):

> "Plaintiff's evidence tended to show that on March 14th, 1918, he was a conductor on the Chicago & Eastern Illinois Railroad, then in control

and being operated by the Government under the Federal Control Act, and lost his left arm by being run over by a car in the freight train of which he was conductor. That while the train was at Bourbon Station, Illinois, moving slowly, he was standing on the west side of a car with his feet in the sill step or stirrup, close to the north end of the car, and his right hand holding onto the handhold or grab iron. The said sill step was fastened to the bottom of the car, within a foot or thereabouts of the north end, and directly over it, about three or four feet, was the handhold or grab iron, a round iron bar about twenty inches long, bent at the ends, which were bolted into the wooden side of the car. But the wood had rotted or been worn away so that the bolts had a play or movement of about an inch or more which made the grab iron loose and defective and permitted it to move to that extent. While thus holding onto the grab iron with his right hand and standing in this step, plaintiff signaled the fireman, with his left hand, to stop the train, but instead of stopping, the train moved forward with a violent jerk at accelerated speed, and by reason of the movement of the loose grab iron, to which plaintiff was holding, he was caused to fall to the ground beside the car, and one of the wheels ran over his left arm and injured it so that it had to be amputated at the shoulder joint. Plaintiff's evidence further tended to show that it was not unusual for conductors or brakemen to stand in the step and hold onto the grab iron to signal orders as to the movement of the train.

"The defendant's evidence tended to show a contrary state of facts and that plaintiff was injured in attempting to exchange papers with the station agent while hanging and leaning out from the ladder on the side of the car near its south end while the same was in motion in passing said station and slipped and fell under the car in so doing. The car was an interstate car and was being used in interstate commerce. As to this there was no dispute. Nor was there any dispute as to the worn condition of the wood around the handhold, and the loose condition of the bolts therein which permitted the grab iron or handhold to have a movement or play of about an inch.

"The petition, which is long, in substance, alleged as to the cause of the accident, first, that the grab iron was defective and insufficient and not securely and safely attached to the side of the said car; that the grab iron, the bolt and other apparatus used to attach the grab iron to the car and the car at the point of attachment were then and there old, worn, loose, unstable, wobbly and rickety and dangerous and unsafe to work about, and had been in that condition for some time before the accident, as defendant knew or might have known by due care, in time to remedy same prior to plaintiff's injury, but negligently failed to do so or warn plaintiff with reference to same, and that by reason of defendant's negligence and 'the defects and insufficiencies' which were due to defendant's negligence, plaintiff was injured.

"Second, that while plaintiff was so riding upon the side of the car and holding to said grab iron

and the train was moving slowly, plaintiff gave the usual signal to the persons in charge of the engine to stop, but they negligently failed to look out and discover said signal, or if they saw it they negligently failed to obey it, but negligently started said train forward without warning plaintiff, knowing, or by the exercise of due care might have known, that plaintiff was in a place of danger of being thrown off by such action and thereby precipitated the plaintiff to the ground whereby he was injured as before stated.

"The third specification is, in substance, the same as the first, except it also alleged the car was being used in interstate commerce, and the grab iron and attachments were not securely fastened as required by the Safety Appliance Act of the United States and the orders of the Interstate Commerce Commission, but old, worn, loose, dangerous and unsafe and in a condition in violation of the said Safety Appliance Act, etc., whereby plaintiff was thrown off and injured.

"The fourth specification is substantially the same as the second, with the additional allegation that the train was started forward with a violent and extraordinary jerk at accelerated speed, and by reason of the movement of the loose grab iron to which plaintiff was holding, he was caused to fall to the ground beside the car, and one of the wheels ran over his left arm and injured it so that it had to be amputated a few hours afterwards at the shoulder joint.

"The petition then alleges that by reason of all 'the aforesaid mentioned matters, singly and col-

lectively, he was thrown from the side of the car and beneath the wheels of one of the cars in said train and one of said wheels ran over plaintiff's arm,' etc."

Respondent (plaintiff) had a verdict and judgment for $15,000.00 in the Circuit Court of St. Louis, Missouri. Division One of the Missouri Supreme Court affirmed it, but on account of dissenting opinion on a point not here raised, transferred it to the Missouri Supreme Court in banc, where case was affirmed upon condition that judgment be reduced to $12,500. There were two members of the Court who dissented on points not here raised.

Without filing a motion for rehearing in the Supreme Court of Missouri, the appellant filed this petition for writ of certiorari, contending that the Missouri Supreme Court erred in holding that a car appliance which was defective and insufficient according to the requirements of the Safety Appliance Acts, and which by reason of such insufficiency caused injury to an employe, gives such employe a right of recovery, even though he was not at the time engaged in coupling or uncoupling cars.

POINTS AND AUTHORITIES.

A violation of the Safety Appliance Acts causing injury to an interstate employe within the meaning of the Federal Employers' Liability Act gives such injured employe a right of recovery.

"The language of the acts and the authorities make it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employe may be in, or the work which he may be doing at the moment when he is injured" (from 243 U. S. 617).

Louisville & Nashville Railroad Co. v. Layton, 243 U. S. 617, l. c. 620, 37 Sup. Ct. R. 456 (appliance not in condition required by Safety Appliance Acts held to be the proximate cause and to warrant recovery, although employe was not coupling or uncoupling cars when injured);

Minneapolis & St. Louis Railroad Co. v. Gotshall, 244 U. S. 66, 37 Sup. Ct. R. 598 (appliance defective in violation of Safety Appliance Acts held to be proximate cause and to warrant recovery, although employe was not coupling or uncoupling cars when injured);

Director General of Railroads v. Ronald, 265 Fed. 138 (C. C. A., Second Circuit), (de-

fective appliance in violation of Safety Appliance Acts held to be the proximate cause and to warrant recovery, although employe was not engaged in coupling or uncoupling cars when injured);

St. Louis & San Francisco Railroad Co. v. Conarty, 238 U. S. 243, 249, 59 L. ed. 1290 (case relied upon by petitioner), (defective apliance in violation of Safety Appliance Acts held not to be the proximate cause, and as employe was not engaged in coupling or uncoupling cars, it would not authorize recovery); distinguished in Layton case above, 243 U. S., l. c. 620;

Lang v. New York Central R. Co., 255 U. S. 455, l. c. 461, 41 Sup. Ct. R. 381, l. c. 384 (case relied upon by petitioner), (defective appliance in violation of Safety Appliance Acts held not to be the proximate cause);

Wolfe v. Payne, D. G. (case at bar), 241 S. W. (Mo. Supreme in Banc), 915, (appliance defective in violation of Safety Appliance Acts which proximately causes injury to employe about his duties gives him right of recovery, although he was not coupling or uncoupling cars at the time);

Philadelphia & R. Ry. Co. v. Eisenhart, 280 Fed. 271 (where appliance is defective in violation of Safety Appliance Acts and is the proximate cause of injuries to an employe about his duties he can recover, although he was not coupling or uncoupling cars at the time).

BRIEF.

The petitioner contends that a grab iron being used by an employe in the usual way, in the course of his work, which is insecure, in violation of the Safety Applicance Act, and which gave way by reason of its insecure condition, causing injury to such employe, does not give such employe a right of action, because, the petitioner contends, the Safety Appliance Act was only intended to afford protection to him while using such grab iron in coupling and uncoupling cars.

It is our contention that when the Safety Appliance Act requires a certain appliance to be in a certain condition, and such appliance is not in that condition, and that by reason of, and as a direct and proximate result thereof, an employe, while about his duties, is injured, then he has a right of recovery.

Under the instruction given in the case at bar, which is set out in full in 241 S. W. (Mo. Supreme Ct., in Banc) 915, l. c. 917, the jury were required to find a negligent violation of a signal under the Employers' Liability Act in part caused the fall of the respondent (plaintiff below), and (not "or") the negligence on the part of the railroad in allowing a defective grab iron to remain on the car under the Employers' Liability Acts and (not "or") a defective

an insecure grab iron under the Safety Appliance Acts and the Employers' Liability Act contributed to cause his fall. The jury were further required to reduce the damages (as would have been necessary if the case had been based only on negligence under the Federal Employers' Liability Act, and there had been no violation of the Safety Appliance Acts), if the jury found that the plaintiff was guilty of contributory negligence.

The petitioner (defendant and appellant below) after a verdict and judgment for the plaintiff in the trial court was therefore forced to argue in the Supreme Court of Missouri that the plaintiff failed to prove each and every one of these three grounds of liability, for if any one of the three was properly proved, in view of the instruction upon which the case was submitted, the plaintiff was entitled to an affirmance. The plaintiff (respondent) contended that each one of the three was properly proved.

The appellant in Division No. 1 of the Missouri Supreme Court, in its attack upon the ground of liability founded on a violation of the Safety Appliance Act in its brief cited and relied upon the Conarty case (238 U. S. 248) without mention of the Layton (243 U. S. 617), Gotschall (244 U. S. 66) or Lang (255 U. S. 455) cases, authough the Layton and Gotschall cases were both given in the current citators as cases in which the Conarty case was cited.

The plaintiff (respondent) then cited the Layton and Gotschall cases and the Ronald case (265 Fed. 138).

An opinion was written by Division No. 1 of the Missouri Supreme Court, concurred in by all four of the Judges and two Commissioners without a dissenting voice, on the point now raised in this petition, and such opinion was thereafter adopted by the Supreme Court of Missouri sitting in banc, without a dissent, upon the question raised on this petition. (Reported 241 S. W. 915.) The case was submitted in Division No. 1 of the court on long printed briefs and extended arguments, and again in the court in banc on new briefs, and was reargued. Appellant's (petitioner's) second brief, filed for the hearing in the Missouri Supreme Court, in banc, did cite, for the first time, the Lang case (255 U. S. 455) but the court, in banc, adopted the opinion of Division No. 1 and did not write an opinion. This probably accounts for the fact that the Lang case, although "cited to the Missouri court," was "not noticed by that court in its opinion."

The Missouri Supreme Court in the case at bar as will be found in its opinion, 241 S. W. 915, did not find it necessary to go into the questions of whether either of the two assignments of negligence under the Employers' Liability Act were properly proved as it found that the assignment and proof that the violation of the Safety Appliance Act proximately caused

the injury to the plaintiff, an employe engaged in interstate commerce, was sufficient for an affirmance of the judgment of the lower court.

The petitioner (defendant and appellant below), as heretofore stated, contends that although the grab iron on the side of the car was insecure so that it was a violation of the Safety Appliance Act for it to be or remain in that condition, and although the insecure condition of the grab iron caused the respondent (plaintiff below), to fall and be injured while the respondent (plaintiff) was standing on a sill step holding to the grab iron giving signals for the management of the train that respondent (plaintiff) could not ground his action on the admitted violation of the Safety Appliance Act, which resulted in his injury because he was not at the time engaged in coupling or uncoupling cars.

In the case at bar appellant (petitioner here) does not contend, nor could it contend, that the grab iron which was insecure in violation of the Safety Appliance Act, was not the proximate cause of the respondent's injuries.

Appellant relies upon the Conarty case, 238 U. S. 248, for the proposition that as the plaintiff in the case at bar was neither engaged in coupling nor uncoupling cars, that he was not within the protection of the Safety Appliance Act. That case if read casually

(before such case was distinguished in the Layton case, 243 U. S., l. c. 620) might leave that impression, but a more careful study of the case shows that the case was decided on the question of "proximate cause." Note this excerpt (238 U. S., l. c. 249) from opinion in the Conarty case:

> "It is not claimed, nor could it be, under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that, had they been complied with, it would not have resulted in injury to the deceased."

The case was so construed by the Court in the **Lang** case, 255 U. S. 455, l. c. 461, 41 Sup. Ct. R., l. c. 384, now relied upon by petitioner, where the Court said:

> "That duty he failed to perform, and if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, 'still the collision was not the **proximate result** of the defect,' or, in other words, and as expressed in effect in the **Conarty case**, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, 'but only that, had they been complied with, it (the collision) would not have resulted in injury to the deceased.' "

In the **Layton** case, 243 U. S. 617, l. c. 620, the Court said:

> "It is urged in argument that this case is ruled by St. Louis & S. F. R. Co. v. **Conarty**, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. Rep. 785. In that case, however, it was not claimed that the collision resulting in the injury complained of was **proximately attributable** to a violation of the Safety Appliance Acts, and, therefore, the claim made for it cannot be allowed."

The Court also said:

> "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employes who were obliged to go between cars to couple and uncouple them, yet these laws, as written, are by no means confined in their terms to the protection of employes only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that **the liability in damages to employes for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employe may be in, or the work which he may be doing at the moment when he is injured.** This effect can be given to the acts, and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employes in damages **whenever the failure to obey these**

safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty."

The **Layton** case was cited and discussed in the case of Director General of Railroads v. Ronald, 265 Fed. 138. The facts in the **Ronald** case appear from the following quotation from page 139 of the opinion:

> "The plaintiff was in the act of dropping from the platform of the caboose car as the train approached this water plug; his right hand holding on to a vertical grab iron on the side of the car, when his weight pulled out the lower end, and he was thrown down on his face and severely injured. The ends of the grab iron were screwed to the wooden side of the car by ordinary screw bolts.
>
> "Both parties moved for a direction, and Judge Hazel directed a verdict for the plaintiff, leaving to the jury the question of the amount of damages."

The Court said (l. c., page 140):

> "The Federal Employers' Liability Act, exclusively regulating the relation of common carriers and their employes while engaged in interstate commerce, was enacted long after the Safety Appliance Act, viz., April 22, 1908 (35 Stat. 65), and this absolute duty of the railroad company under the Safety Appliance Act to its employes, injured when engaged in interstate commerce, must be considered as incorporated in

it. Whenever a violation of that act is the proximate cause of the injury, the negligence of the railroad company is ipso facto established."

In a concurring opinion, Manton, Circuit Judge (l. c., page 143) said:

"The legislation was clearly for the safety of employes. Coupling and uncoupling cars is, indeed, but one of the many acts that require the boarding and alighting from cars, and in light of the automatic coupling requirements statute, the need to board and alight from cars solely for the purpose of coupling or uncoupling cars is greatly diminished. **The Supreme Court has placed no such construction upon these statutes when it has had occasion in the past to refer to them.**

"In Louisville & Nashville R. Co. v. **Layton**, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, the Court held that the purpose of the Safety Appliance Act was to promote the safety of employes, and ruled that it was unlawful for any carrier engaged in interstate commerce to use on its railroad cars not so equipped (Southern R. Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72). The Court there said:

'The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the em-

ployе may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.'

"This positive duty upon the carrier to comply with the statute was recently announced and held to apply where an employe was not engaged in coupling or uncoupling cars, and where it appeared that he was injured because of the failure of an automatic coupler to perform its function (S. R. R. Co. v. Railroad Commission, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661).

"In McManey v. C. R. & I. R. Co., 132 Minn. 391, 157 N. W. 650, the grab iron gave way on a caboose while the plaintiff was boarding the train after having turned a switch. The highest court of Minnesota held that to make applicable these provisions of the Safety Appliance Act, and to fasten civil liability for the failure to comply with the Interstate Commerce Commission order, it was not necessary to show that the injured employe was actually engaged in coupling or uncoupling cars when so injured."

In the **Gotschall** case, 244 U. S. 66, the Court held that, although Gotschall was not engaged in coupling

or uncoupling cars, but was walking along the top of the cars when the couplers separated, causing a jerk, which threw him off and killed him, that his administrator could recover under the Safety Appliance Act.

In the **Lang** case, 255 U. S. 455, l. c. 458, 41 Sup. Ct. R. 381, l. c. 383, instead of overruling the **Layton** case, as appellant mildly intimates, the Court distinguishes the Lang case from the Layton case on the question of proximate cause.

The Court says:

> "It is insisted upon, however, and to what is considered its determination is added a citation from the Layton case declaring that the Safety Appliance Act makes 'it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not' equipped as there provided, and, further, 'by this legislation the qualified duty of the common carrier is expanded into an absolute duty in respect to car couplers,' and by an omission of the duty the carrier incurs 'a liability to make compensation to any employe who' is 'injured by it.' But necessarily there must be a **causal relation** between the fact of delinquency and the fact of injury, and so the case declares. Its concluding words are, expressing the condition of liability, 'that carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the **proximate cause** of injury to them when engaged in the discharge of duty."

The Court further said (255 U. S., l. c. 461):

> "That duty he failed to perform, and, if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, 'still the collision was not the proximate result of the defect,' or, in other words, and as expressed in effect in the Conarty case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, 'but only that, had they been complied with, it (the collision) would not have resulted in injury to the deceased.'"

Mr. Justice Clarke wrote a strong dissenting opinion in the **Lang** case, 255 U. S. 455, l. c. 461, which was concurred in by Mr. Justice Day, to the effect that even in a case such as the Lang case, that the violation of the Safety Appliance Act should be held to be the proximate cause of the plaintiff's injuries.

The United States Circuit Court of Appeals for the Third Circuit decided a case involving the same point about the same time that our Missouri Supreme Court in banc decided the case at bar. The case was Philadelphia & R. Ry. Co. v. Eisenhart, 280 Federal Reporter, 271. The following is from the opinion of that Court (pages 272 to 275):

Woolley, Circuit Judge:

"The cars of a freight train were being distributed to several tracks in the yards of the defendant at East Penn, Pennsylvania. Eisenhart, the conductor, was riding on a draft of two cars which had been cut from the train and kicked to a siding. His task was to stop them at their destination. While these cars were still in motion the train parted by reason of the opening of couplers and another draft of cars broke away and, following down on the same track without a brakeman, collided with the car on which Eisenhart was riding, throwing him to the ground and causing him injury.

"Eisenhart brought this action, charging negligence to the defendant for violating both the Safety Appliance Act and the rule of common law. Safety Appliance Act, § 2, 27 Stat. 531, and amendments (Comp. St. § 8606). He had a verdict. The defendant sued out this writ of error.

"The case was tried mainly on the liability of the defendant for operating a car with a defective coupler in violation of the Safety Appliance Act, carrying, of course, the advantage to the plaintiff of relief from the law of assumption of risk and contributory negligence. The defendant maintains by this writ that under the evidence, as well as by a proper interpretation of several decisions of the Supreme Court construing the Safety Appliance Act, the plaintiff did not bring himself within the Act and that, in consequence, his right to recover, if any, was on the counts charging negligence under the rule of common

law with its burden of assumption of risk and contributory negligence, and that, accordingly, the trial court erred in submitting the case on the statute.

"Obviously, the plaintiff's injury was due to the uncoupling of the train at a place at which uncoupling was not intended and at which the plaintiff was not working. For evidence of negligence in support of the counts under the Safety Appliance Act the plaintiff relied upon the inference of a defective coupler, drawn from the fact that the couplers uncoupled, and upon testimony to the effect that when examined after the accident the couplers showed lost motion between the lock and knuckle, enough to have caused the cars to part.

"Regarding as the test of compliance with the statute the equipping of cars 'with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,' the defendant introduced evidence to the effect that the couplers were of an accepted type and in good condition, and had, both before and after the accident, coupled and uncoupled in the way provided by the statute. Having complied with this statutory standard, the defendant maintains that nothing more was required of it; and that, as the plaintiff was not injured by reason of the couplers failing to meet this standard, but was injured some distance away by reason of a collision, the case comes within the decision of the Supreme Court in **Lang** v. New York Central R. R. Co., 255 U. S. 455, 41 Sup. Ct. 381, 65 L. Ed. 729,

where it was said that the Safety Appliance Act 'was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of cars. It was not * * * to provide a place of safety between colliding cars,' quoting from S. L. & S. F. R. R. Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290. Reliance by the defendant upon its interpretation of the Lang decision compels a review of several decisions of the Supreme Court bearing on the Safety Appliance Act.

"The first is the **Conarty** case. In this case a car without a coupler or drawbar at one end was on a switch awaiting removal for repair. A switching engine with which the deceased was working came along the same track and a collision ensued. The deceased was standing on the footboard at the front of the engine and was caught between the engine and the body of the car. Had the coupler and drawbar been in place they would have kept the engine and the car sufficiently apart to have prevented the injury. They would not have prevented the collision.

"The question arose whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Act required that the car be equipped with automatic couplers and drawbars of standard height. Inquiring into the general purpose of the act and the evil it was intended to prevent, the Supreme Court alluded to the danger to men going between cars to couple and uncouple them

and said that the principal purpose of the enactment of the statute was 'to obviate the necessity for men going between the ends of the cars.' It found that the deceased, 'who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit.' Holding that the plaintiff was not within the class of persons for whose benefit the statute was enacted, the Court denied recovery. This decision was regarded, either rightly or wrongly, as an interpretation of the Act limiting its application, so far as automatic couplers are concerned, to those whose duty it is to couple and uncouple cars. In considering the effect of this decision upon later decisions and upon the case at bar it is pertinent to note that the Court very carefully pointed out that

" 'It is not claimed, nor could it be under the evidence, that the collision was **proximately** attributable to a violation of [the] provisions [of the Act] but only that had they been complied with it would not have resulted in injury to the deceased.'

"In Louisville & Nashville R. R. Co. v. **Layton**, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, the next case in order, an engine, pushing a car ahead of it, came into a switch and attempted to couple a draft of five cars. It struck the cars with such force that the couplers refused to couple automatically by impact and the whole draft was driven down the track and came into

collision with a standing train with such violence that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track and injured. As the plaintiff did not sustain injury when coupling or uncoupling cars, **the defense was based on the claim** that it had been decided in the Conarty case **that the Safety Appliance Acts is 'intended only for the benefit of employes injured when** between cars for the purpose of **coupling or uncoupling them.' The Supreme Court, evident'y desiring to dispel this view, said:**

"'While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employes who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employes only when so engaged. The language of the acts * * * makes it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employe may be in or the work which he may be doing at the moment when he is injured.'

"Again pointing out that in the Conarty case it was not claimed that the collision resulting in the injury was proximately attributable to a violation of the Safety Appliance Act, **the Court laid down a rule—from which it has not departed —that**

" 'Carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.'

"The Court sustained the judgment on the finding that the failure of the couplers automatically to couple by impact was the proximate cause of the collision and resultant injury.

"Later came Minneapolis & St. Louis Railroad Co. v. **Gotschall**, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, a case in which a train parted because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes on the detached draft upon which Gotschall was riding and a sudden jerk which threw him off the train under the wheels—facts singularly similar to those of the case at bar. While the case went off on another question, the Court sustained the judgment for the plaintiff **consistently with its former pronouncement that whenever the failure to obey the safety appliance laws is the proximate cause of the injury the carrier is liable.**

"Such was the law until **Lang** v. New York Central R. R. Co., supra. In this case a car without a drawbar or coupler was standing on a siding. The decedent was a brakeman riding on a draft of cars kicked toward the crippled car. He knew the condition of the car. A collision occurred and the decedent was crushed between the car upon which he was riding and the standing car. It was not intended that he should couple his draft with the defective car, but that he should stop his draft before it reached the

car. For some reason he failed to do so and collision followed. Recovery was not allowed.

"The plaintiff in error regards the law of the Lang case as a reversal to the law of the Conarty case, not as explained in the Layton case, but as it was first popularly understood. This position is taken, doubtless, because the Court cited and affirmed the Conarty case. But the Court also affirmed the Layton case, **restating with emphasis the rule of proximate cause** which, being invoked in the Layton case, distinguished that case from the Conarty case, saying:

" 'But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and so the case declares, * * * carriers are liable to employes in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.'

"The Court held in the Lang case, as in the Conarty case, that 'the collision was not the proximate result of the defect' in the safety appliance, or, stated differently, 'that the collision under the evidence cannot be attributed to a violation of the provisions of the law, "but only that had they been complied with, it [the collision] would not have resulted in injury to the deceased.' " The judgment for the defendant was sustained.

"[1.] **We cannot agree with the plaintiff in error in its contention that the Supreme Court, in the Lang case, construed the Safety Appliance Act** as restricting the liability of carriers to equipping cars with couplers of the standard re-

quired and **as limiting its protection to employes in the act of** or at the place of **coupling and uncoupling cars.** Whatever difference there may be in the opinions, the three cases cited, as also the Gotschall case inferentially, were tried and decided on the principle of causal relation between the fact of delinquency and the fact of injury, that is, **they were, with entire consistency, tried on the question whether on the facts of each case the carrier's failure to obey the statute was or was not the proximate cause of injury to the employe, without regard to the place and character of his work.** This is the test of liability.

"Returning to the case at bar, we find that the learned trial judge submitted the case on the question of proximate cause strictly in line with these decisions."

The petitioner (defendant in trial court, and appellant in Missouri Supreme Court) does not contend and of course could not contend, that the loose condition of the grab iron, which did not comply with the requirements of the Safety Appliance Acts, was not the proximate cause of the respondent's (plaintiff below) injuries.

In the case of Lee A. Wolfe v. John Barton Payne, Director General of Railroads, etc., 241 Southwestern (Missouri Supreme Court in Banc) 915, l. c. 918 (the case at bar), the Court said:

"It is contended by learned counsel for appellant that inasmuch as said section 8608 required

said secure grab iron or handhold only 'for greater security to men in coupling and uncoupling cars,' and plaintiff was not so engaged when injured, he has no cause of ation under said Safety Appliane Act. In support of the proposition appellant cites St. Louis & San Francisco Railroad Company v. Conarty, 238 U. S. 248. That case is distinguished in Louisville & Nashville Railroad Company v. Layton, 243 U. S., l. c. 620, and the doctrine clearly announced there that the benefit of the statute is not restricted to employes while coupling or uncoupling cars, but extends to all employes while injured in using such defective appliances in the discharge of their duties. The same rule was applied in a later case of Minn. & St. Louis Railroad Company v. Gotschall, 244 U. S. 66. See, also, Director General v. Ronald, 265 Fed. 138. So that we rule this point against the appellant."

We respectfully submit that the petition for writ of certiorari should be denied.

SIDNEY THORNE ABLE,
CHARLES P. NOELL,
P. H. CULLEN,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 468.

JAMES C. DAVIS, Designated Agent Under the Transportation Act, Petitioner,

vs.

LEE A. WOLFE, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

NOTICE OF MOTION TO ADVANCE THE WITHIN CAUSE ON THE DOCKET FOR AN EARLY HEARING.

To James C. Davis, Designated Agent under the Transportation Act, Petitioner, and Thos. P. Littlepage, James C. Jones, Lon O. Hocker, Frank H. Sullivan and Ralph T. Finley, his Attorneys of Record:

Take notice, that on Monday, February 19th, 1923, at the opening hour of the Supreme Court of the United States, or as soon thereafter as counsel can be

heard, the respondent will present to the Supreme Court of the United States at Washington, D. C., a motion to advance the within cause on the docket for an early hearing. A copy of such motion is herewith furnished you.

Sidney Thorne Able,
Charles P. Noell,
Counsel for Respondent.

We acknowledge timely service of the above and foregoing notice, with a copy of the motion above mentioned.

January 27, 1923.

Thos. P. Littlepage,
James C. Jones,
Lon O. Hocker,
Frank H. Sullivan,
Ralph T. Finley,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

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LEE A. WOLFE, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

MOTION TO ADVANCE THE WITHIN CAUSE ON THE DOCKET FOR AN EARLY HEARING.

Comes now the respondent and moves the Court to advance this cause on the docket as there are circumstances existing which entitle it to an early hearing.

The respondent recovered a judgment for the loss of his arm as a proximate result of a failure of his employer, the petitioner (a common carrier by railroad) to comply with the provisions of the Safety Appliance Acts requiring secure grab irons at sides

and ends of cars. He was engaged in his work as a conductor at the time, but was not coupling or uncoupling cars, when the grab iron required by Section 8608 of the Compl. Stats. U. S. 1918, to be secure caused him to fall and be injured by reason of its loose condition.

The Supreme Court of Missouri affirmed the judgment, saying (Transcript of Record, page 140):

> "Section 8608 (Compl. Stats. U. S. 1918), as follows:
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> " '8608. Grab Irons or Handholds.—From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars (March 2, 1893, c. 196, sec. 4, 27 Stat. 531).'
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> "Section 8618 required all such cars 'to be equipped with secure sill steps.'
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> "It is contended by learned counsel for appellant that inasmuch as said section 8608 required said secure grab iron or handhold only 'for greater security to men in coupling and uncoupling cars,' and plaintiff was not so engaged when injured, he has no cause of action under said Safety Appliance Act. In support of the proposition, appellant cites St. Louis & San Francisco Railroad Company v. Conarty, 238

U. S. 248. That case is distinguished in Louisville & Nashville Railroad Company v. Layton, 243 U. S., l. c. 620, and the doctrine clearly announced there that the benefit of the statute is not restricted to employes while coupling or uncoupling cars, but extends to all employes while injured in using such defective appliances in the discharge of their duties. The same rule was applied in a later case of Minne. & St. Louis Railroad Company v. Gotschall, 244 U. S. 66. See also Director General v. Ronald, 265 Fed. 138. So that we rule this point against the appellant."

The case is now here on writ of certiorari to the Supreme Court of the State of Missouri, the petitioner contending that in the case of Lang v. N. Y. Central etc. Ry. Co., 255 U. S. 460, this Court overruled the cases cited by the Missouri Supreme Court by holding that an employe could not recover under the Safety Appliance Act unless he was engaged in coupling and uncoupling cars; and with respondent contending that the Lang case (255 U. S. 460) like the Conarty case (238 U. S. 248) was decided on the question of "proximate cause" as indicated by this Court in the opinion in the Lang case (255 U. S., l. c. 461), and that instead of overruling the Layton (243 U. S. 617) and Gotschall (244 U. S. 66) cases, as petitioner claims, that the Lang case, the Conarty case, the Layton case and the Gotschall case are all in perfect accord and were all decided on the question of

"proximate cause" and not on the question of "the position the employe may be in, or the character or work he may be doing at the moment he may be injured" (quotation from Layton case, 243 U. S., l. c. 620).

It is evident from the fact that this Court granted the petition for the writ of certiorari in this case that this Court desires to put at rest the claimed conflict (see Phila. & R. Ry. v. Eisenhart, 280 Fed. 271, 272-275) between these decisions, and as a large percentage of all claims arising out of injuries to employes of railroads arise under the Safety Appliance Acts it is at once apparent that the law on such point should be put at rest at the earliest possible time. We are aware of five cases for serious, permanent injuries that are pending in the City of St. Louis alone which involve the very same point raised here. There are many such cases pending in the various state and federal courts of the United States, and for this reason it is a matter of great concern to the public, to the state and federal trial and appellate courts, to injured railroad employes and to railroad companies that this Court should settle such matter at the earliest possible date so that the various state and federal appellate courts may follow this Court and correctly apply the law.

We respectfully urge and request that the case be advanced on the docket for an early hearing.

SIDNEY THORNE ABLE,
CHARLES P. NOELL,
Attorneys for Respondent.

Comes now your affiant, and upon his oath states, that he is agent and attorney for the respondent herein and that the matters and things set out in the above motion are true and correct.

Sidney Thorne Able.

Subscribed and sworn to before me this 26th day of January, 1923. My commission expires January 26th, 1924.

Maud J. Hamilton,
Notary Public.

(Seal)

DAVIS, DESIGNATED AGENT UNDER THE TRANSPORTATION ACT, *v.* WOLFE.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 71. Argued October 12, 1923.—Decided November 12, 1923.

1. Where a failure of a railway company to comply with the Safety Appliance Act is the proximate cause of an accident resulting in injury to an employee while in the discharge of his duty, he may recover, although the operation in which he was engaged was not of the kind in which the appliances required by the act were specifically designed to furnish him protection. P. 241.
2. So *held* where a conductor, engaged in signalling orders for the movement of a freight train while riding on the side of a car with his feet in a sill-step and one hand grasping a grab-iron, was thrown to the ground, as the train moved forward contrary to his order, and was run over, his fall being attributable to the loose condition of the grab-iron.

294 Mo. 170, affirmed.

CERTIORARI to a judgment of the Supreme Court of Missouri affirming a judgment recovered by a railway employee in an action for personal injuries, under the Federal Employers' Liability Act.

Mr. Frank H. Sullivan, with whom *Mr. Thos. P. Littlepage, Mr. William O. Reeder* and *Mr. Homer T. Dick* were on the brief, for petitioner.

Mr. Sidney Thorne Able and *Mr. P. H. Cullen,* for respondent, submitted. *Mr. Charles P. Noell* and *Mr. Walter L. Brady* were also on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The respondent Wolfe brought this action in a Circuit Court of Missouri to recover damages for personal injuries suffered by him while employed as the conductor

of a freight train on a railroad under federal control, basing his right of recovery upon the Employers' Liability Act in connection, primarily, with an alleged violation of the provisions of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended by the Act of March 2, 1903, c. 976, 32 Stat. 943. He had a verdict and judgment; and the judgment was affirmed by the Supreme Court of the State. 294 Mo. 170.

The petitioner contends that there was no evidence to take the case to the jury under the Safety Appliance Act and that it was erroneously held to be applicable in the situation presented.

Section 4 of the original act, as amended by the Act of 1903, provides that, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful to use on any railroad engaged in interstate commerce any car "not provided with secure grab irons or handholds in the ends and sides . . . for greater security to men in coupling and uncoupling cars." *Southern Railway* v. *United States*, 222 U. S. 20, 24.

It was undisputed that the carrier was engaged in interstate commerce and that Wolfe was employed in such commerce. As found by the Supreme Court of Missouri his evidence tended to show the following facts: While the freight train of which he was conductor was at a station, moving slowly, he was standing on the side of one of the cars, with his feet in a sill-step fastened to the bottom of the car within about a foot of its end, and holding on with his right hand to a grab iron or handhold directly over the sill-step and about three or four feet from it. This grab iron consisted of a round iron bar bent at the ends, which were bolted into the wooden side of the car. The wood had rotted or been worn away, so that the bolts had a play or movement of about an inch, which made the grab iron loose and defective and permitted it to move to that extent. While thus standing on the sill-

step and holding on to the grab iron with his right hand, Wolfe signalled the fireman with his left hand to stop the train. But instead of stopping it moved forward with a violent jerk at accelerated speed, and by reason of the movement of the loose grab iron to which Wolfe was holding, he was caused to fall to the ground beside the car and one of its wheels ran over his left arm and injured it so that it had to be amputated at the shoulder joint. It was, furthermore, not unusual for conductors or brakemen to stand in the sill-step and hold on to the grab iron to signal orders as to the movement of the train. The loose condition of the grab iron was not disputed.

The argument in behalf of the petitioner is, in substance, that on these facts Wolfe was not in a situation where the defective grab iron operated as a breach of duty imposed for his benefit by § 4 of the act, which, it is urged, merely requires the furnishing and maintenance of grab irons in behalf of employees engaged in coupling or uncoupling cars or a service connected therewith, and does not require them as a means of, or aid to, the transportation of employees.

While there is no previous decision of this Court relating to this aspect of § 4, a controlling analogy is to be found in its decisions as to the application of § 2 of the act, which, as amended, makes it unlawful to use on a railroad engaged in interstate commerce any car not equipped with automatic couplers capable of being coupled and uncoupled "without the necessity of men going between the ends of the cars." This section has been considered in four cases in which the injured employees were not engaged either in coupling or uncoupling or in any service connected therewith.

In *St. Louis Railroad* v. *Conarty*, 238 U. S. 243, a switch engine ran, in the dark, into a standing car whose coupler and drawbar had been pulled out, and the engine,

in the absence of these appliances, coming in immediate contact with the end of the car, a switchman riding on the footboard of the engine was caught between it and the body of the car; and in *Lang* v. *New York Central Railroad*, 255 U. S. 455, through failure to stop in time a string of cars that had been kicked in on a siding, it ran into a standing car whose coupler attachment and bumpers were gone, and the brakeman on the end of the string of cars was caught between the car on which he was riding and the standing car. In these cases it was held that, the collisions not being proximately attributable to the absence of automatic couplers on the standing cars, the carriers were not liable for the injuries received by the employees, even if the collisions would not have resulted in injuries to them had the couplers been on the standing cars, the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes.

In *Louisville Railroad* v. *Layton*, 243 U. S. 617, the failure of couplers to work automatically in a switching operation resulted in a collision of cars, from one of which a brakeman was thrown while preparing to release brakes; and in *Minneapolis Railroad* v. *Gotschall*, 244 U. S. 66, a brakeman was thrown from a train as the result of defective couplers coming open while the train was in motion. In these cases, the defect in the couplers being in each the proximate cause of the injury, it was held that the employees were entitled to recover. In the *Layton Case* the Court, after specifically distinguishing the *Conarty Case* on the ground that in that case the collision resulting in the injury was not proximately attributable to a violation of the act (p. 620), said:

"While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple

and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." (p. 621.)

The doctrine of this case was explicitly recognized in the *Lang Case*, in which the *Layton Case* was distinguished, on the facts, on the ground that "necessarily there must be a causal relation between the fact of delinquency and the fact of injury" (p. 459).

The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

This construction of the act is substantially that given by the Circuit Courts of Appeals of the Second, Fourth and Sixth Circuits in *Director General* v. *Ronald*

(C. C. A.), 265 Fed. 138; *Philadelphia Railway* v. *Eisenhart* (C. C. A.), 280 Fed. 271, and *McCalmont* v. *Pennsylvania Railroad* (C. C. A.), 283 Fed. 736; and by the state courts in *McNaney* v. *Chicago Railway*, 132 Minn. 391, and *Ewing* v. *Coal Railway Co.*, 82 W. Va. 427.

It results that in the present case, as there was substantial evidence tending to show that the defective condition of the grab iron required by § 4 of the Safety Appliance Act was a proximate cause of the accident resulting in injury to Wolfe while in the discharge of his duty as a conductor, the case was properly submitted to the jury under the act; and the issues having been determined by the jury in his favor the judgment of the trial court was in that behalf properly affirmed.

The judgment of the Supreme Court of Missouri is accordingly

Affirmed.

CANUTE STEAMSHIP COMPANY, LTD., ET AL. v.